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FCC Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-192

In Re Applications of

THOMAS W. LAWHORNE File No. BPH-880505OA

CAM-BROADCASTING, INC. File No. BPH-880505OJ

For Construction Permit for a
New FM Station Channel 271A
At Sylvester, Georgia

Appearances

Bruce A. Eisen, Esq. on behalf of Thomas W. Lawhorne; *Robert Lewis Thompson, Esq.* on behalf of CAM-Broadcasting, Inc.; and *Charles Dziedzic, Esq.* on behalf of the Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: June 19, 1995; Released: June 27, 1995

PRELIMINARY STATEMENT

1. This proceeding was initiated in 1988 when Thomas W. Lawhorne ("Lawhorne") and CAM-Broadcasting, Inc. ("CAM") filed mutually exclusive applications for a new FM broadcast station to operate on Channel 271A at Sylvester, Georgia.[1] By *Hearing Designation Order*, 5 FCC Rcd 1095 (1990), the applications were designated for a comparative hearing under the "standard comparative" issue then in effect.

2. Prior to the hearing date and the taking of testimony, Presiding Judge Edward J. Kuhlmann added various issues against CAM. By *Memorandum Opinion and Order*, FCC 90M-2335, released August 2, 1990, the following issues were specified:

> To determine whether or not CAM-Broadcasting, Inc. has reasonable assurance that its specified antenna site will be available to it;
>
> To determine whether or not CAM-Broadcasting, Inc. has abused the Commission's processes by threatening a competing applicant with the use of unknown information to be filed as a motion to enlarge issues unless the applicant acceded to its settlement demands; and
>
> To determine whether, in light of the evidence adduced pursuant to the foregoing issues, whether or not CAM-Broadcasting, Inc. is basically qualified to be a Commission licensee.

3. Subsequently, by *Memorandum Opinion and Order*, FCC 91M-229, released January 22, 1991, the following additional issues were designated:

> To determine whether or not CAM-Broadcasting, Inc. falsely certified and misrepresented facts to the Commission concerning its financial qualifications to build and operate its proposed radio station at Sylvester, Georgia; and
>
> To determine, in light of the evidence adduced under the foregoing issue, whether or not CAM-Broadcasting, Inc. is qualified to be a Commission's licensee.

4. The hearing convened on January 22, 1991. The Presiding Judge dismissed CAM's application for failure to submit written testimony on the site issue. *Memorandum Opinion and Order*, FCC 91M-267, released January 24, 1991. Thereafter, the Review Board partially granted CAM's appeal and remanded the matter to the Judge on procedural grounds, having found that CAM's "dismissal" had been harmless error, but that the Judge should have "denied" CAM's application on the merits of the site issue by announcing a total failure of proof, 6 FCC Rcd 1864 (1991). Subsequently, the Judge released an Initial Decision, 6 FCC Rcd 4183 (1991), in which he disqualified CAM for its failure to meet its burden under the antenna site issue because it had not exchanged sufficient evidence on the issue. The Judge granted Lawhorne's application, and did not address the other basic qualifying issues that had previously been designated against CAM.

5. The Review Board affirmed the Judge, 7 FCC Rcd 13 (Rev. Bd. 1992), and the Commission denied CAM's application for review, 7 FCC Rcd 4341 (1992).

6. CAM appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit, but the Court, upon the Commission's request, remanded the proceeding back to the Commission. In its order of remand, the Court found that the site availability issue had already been satisfied and that there was no need for the issue to be further considered.

7. Lawhorne filed a Motion for Remand to Administrative Law Judge on May 2, 1994. The Commission thereupon remanded the proceeding to the Chief Administrative Law Judge for further hearings on basic qualifying issues previously specified against CAM, 9 FCC Rcd 4475 (1994).

8. On February 5, 1992, while CAM's application for review was pending, Lawhorne filed a Conditional Motion to Reopen the Record and Enlarge Issues. The Motion addressed CAM's financial and reporting violations occasioned by its failure to disclose that one of its nonvoting stockholders had withdrawn from the corporation. The Commission had dismissed that motion as moot in light of its decision to disqualify CAM for a failure to meet its evidentiary burden under the site issue. Subsequent to the Commission's remand, Lawhorne filed a motion to

[1] A third applicant, Sylvester Communications Limited Partnership, dismissed its application in return for future reimbursement costs from Lawhorne. *See, Memorandum Opinion and Order*, FCC 90M-2335, released August 2, 1990.

enlarge issues premised upon the earlier motion as well as upon certain state proceedings instituted against CAM's non-voting stockholder, Dr. Russell A. Acree. By *Memorandum Opinion and Order*, FCC 94M-580, released October 20, 1994, the Presiding Judge enlarged the issues as follows:

> To determine whether CAM-Broadcasting, Inc. was lacking in candor and/or misrepresented facts respecting its ownership structure and, if so, the effect of such conduct upon its basic qualifications to be a Commission licensee;
>
> To determine whether CAM-Broadcasting, Inc. violated Section 1.65 of the Commission's Rules by failing to report major changes in its ownership structure, and if so, whether it is qualified to be a Commission licensee;
>
> To determine whether or not CAM-Broadcasting, Inc. lacked candor in failing to report to the Commission that its one-third non-voting shareholder, Dr. Russell Acree, had been notified of a hearing and had entered into a Consent Order with the State of Georgia whereby he was found to have violated state and federal drug laws by writing prescriptions using the names of deceased patients; and
>
> To determine in light of evidence adduced pursuant to the foregoing issues, whether or not CAM-Broadcasting, Inc. has the requisite qualifications to be a Commission licensee.

9. A prehearing conference was held on October 4, 1994. The hearing commenced in Washington, D.C. on February 14, 1995, and the record was closed on that date. Witnesses Dr. Russell A. Acree, Loron Coxwell, and R.T. Tebeau gave testimony by speakerphone. *See, Order*, FCC 95M-43, released February 9, 1995.

FINDINGS OF FACT

Financial Qualification/False Certification Issues - CAM-Broadcasting, Inc.

10. Mrs. Coxwell testified that, when she signed CAM's Form 301 application, CAM's financial certification was based on a loan commitment that she had received from the Adel Banking Company (the "Bank") (CAM Ex. 4, p. 1). That commitment was memorialized in the Bank's letter to Mrs. Coxwell, dated May 4, 1988 (CAM Ex. 4, Appendix A). She had reviewed Section III of the Form 301 application that CAM's FCC counsel had sent to her as well as a draft letter from counsel for her use in getting one of her local banks to give reasonable assurance that committed funds for CAM's proposed FM station would be available (*Id.*).

11. Mrs. Coxwell had two phone conversations on May 3, 1988 with R.T. Tebeau, president of Adel Banking Company (CAM Ex. 4, pp. 1-2; Tr. 249). She knew about the Bank through her brother-in-law, William Thomas Coxwell, who had told her about several dealings he had with that bank and that the bank was eager to help other small communities (*Id.*).

12. In the first phone conversation with Mr. Tebeau, she identified CAM's two other investors, Randall Acree, Esq. and Dr. Fred McLean (CAM Ex. 4, p. 2). Mr. Tebeau told her that he was favorably acquainted with attorney Randall Acree and his father, Dr. Russell Acree, who then was a member of the Board of Adel Banking Company (*Id.*). Mr. Tebeau also told her that he was acquainted with Dr. Frederick McLean (*Id.*). In that first conversation with Mr. Tebeau, she also described her FCC application for the new Sylvester FM station, she discussed generally CAM's proposed costs and she told Mr. Tebeau that CAM needed from the Bank what the FCC calls "reasonable assurance" of a loan to meet CAM's $200,000 budget (*Id.*). She discussed with him the proposed tower site, the land and the buildings that would be constructed as well as the equipment needs and the first three months' operating costs (Tr. 251). During that same discussion with Mr. Tebeau (Tr. 251), she referred to her handwritten notes about the FM project (CAM Ex. 4, Appendix B), which she had taken during an earlier conversation with CAM's FCC counsel (CAM Ex. 4, p. 2). She also told Mr. Tebeau that she would call him back later in the day to get the Bank's decision whether CAM could rely on the bank for reasonable assurance of its financial qualifications (*Id.*). Mrs. Coxwell had faxed Mr. Tebeau a draft bank letter (Tr. 249).

13. In Mrs. Coxwell's second phone conversation with Mr. Tebeau on May 3, 1988, he notified her that the Bank would be willing to grant CAM's loan request for $200,000 and would issue CAM the commitment letter that she had requested (*Id.*). When Mrs. Coxwell asked Mr. Tebeau whether he needed any written documents from CAM at that time, he said not at that time, only after CAM got the construction permit (Tr. 252).

14. Adel Bank president R.T. Tebeau testified in February 1995 that, while his memory was not clear about to whom he spoke with more, he recalled that he had contact in 1988 with both Mrs. Coxwell and Randall Acree about CAM's need for a bank commitment (Tr. 139). Mr. Tebeau remembered little about the 1988 bank letter to CAM, other than that he wrote it (Tr. 140). Mr. Tebeau repeatedly emphasized that he was not able to clearly remember conversations back in 1988--seven years earlier (Tr. 141).

15. Mr. Tebeau confirmed, however, that he did know in 1988 that CAM's three shareholders were Mrs. Coxwell, Randall Acree and Dr. Frederick McLean (Tr. 147). He testified that the Bank had past dealings with both Randall Acree and Dr. McLean (Tr. 147). He testified that the Bank had a "long and established relationship with Randall Acree." (Tr. 150-1).

16. Mr. Tebeau has never met Mrs. Coxwell in person (Tr. 139). Adel Banking Company has loaned funds to Worth County Hospital, and Mr. Tebeau has talked to Mrs. Coxwell in the past about matters that might have concerned that loan, because she is secretary to the hospital administrator.

17. Mr. Tebeau recalled having been provided with a sample bank letter and that he had been asked to write a letter that followed the sample's general outline (Tr. 140). Although Mr. Tebeau had no present recollection of ever having discussed station financing with Mrs. Coxwell, he did have a conversation with Randall Acree in May 1988 to discuss the sample and the need for a letter from the Bank to support the application (Tr. 141-142).

18. In May of 1988, the Bank did not have an established relationship with CAM, nor did it have a personal banking relationship with any of its stockholders, with the exception of Randall Acree, whose business had been limited to

small loans and possibly a checking account, but whose financial statement was not filed at the Bank (Tr. 147, 148-151).

19. When shown the May 4, 1988 bank letter, Mr. Tebeau testified that the second paragraph reference to Mrs. Coxwell's "professional abilities and knowledge of the business" had nothing to do with her, and that the phrase had been copied from the sample letter provided to him by Randall Acree (Tr. 144).

20. Mr. Tebeau testified that at the time he signed the May 4, 1988 letter, the Bank did not have a present firm intention to provide the $200,000 requested by CAM, but rather a willingness to pursue the matter if CAM received a construction permit and provided the necessary information that would be associated with a loan request (Tr. 153).

Abuse of Process Issue - CAM-Broadcasting, Inc.

21. On or about Wednesday, June 13, 1990, Mrs. Coxwell, Thomas W. Lawhorne, and their respective communications attorneys engaged in a conference call to discuss the possibility of settlement (CAM Ex. 2, p. 2). The conference call began with some preliminary talk about the importance of settlement, but soon, according to Lawhorne, CAM's attorney began to urge reasons why he thought CAM was a comparatively superior applicant to Lawhorne (Lawhorne Ex. 1, p. 1).

22. Mrs. Coxwell testified that, early into the conference call, Mr. Lawhorne indicated that he was interested only in winning and building the station and that he would not even discuss dismissing his application or merging with CAM. Mr. Lawhorne rejected CAM's cash offer and refused even to give CAM a cash amount at which he would dismiss his application (CAM Ex. 2, p. 1).

23. Mr. Lawhorne testified that CAM counsel, Robert Thompson, stated during the conference call that unless Mr. Lawhorne settled the proceeding on CAM's terms, his client intended to file an "embarrassing" motion to enlarge issues against Mr. Lawhorne, the basis for which Thompson did not disclose (Lawhorne Ex. 1, pp. 1-2). Angered, Lawhorne responded that he would move forward to hearing and not give in to threats (Lawhorne Ex. 1, p. 2).

24. Lawhorne understood that he would be provided with a letter containing CAM's settlement proposal, and, on or about June 18, 1990, his attorney, Bruce Eisen, sent him a copy of Mr. Thompson's letter (Lawhorne Ex. 2, Stipulation between Thomas W. Lawhorne and CAM-Broadcasting, Inc.[2] In addition to outlining CAM's settlement terms, the second full sentence of CAM's letter recited as follows:

> We are fearful that the potential embarrassing nature of matters that would arise from our motion to enlarge would forever thereafter harden Mr. Lawhorne against any settlement, no matter how bleak his prospects.

Lawhorne rejected the settlement proposal and instructed counsel to prepare a motion to enlarge issues against CAM premised upon the threats made during the course of the conference call and reconfirmed in the June 18, 1990 letter (Lawhorne Ex. 1, p. 3).

25. Mrs. Coxwell testified that her counsel did not threaten Mr. Lawhorne about a motion to add a special issue against him; rather, he simply stated that once motions to enlarge are filed, positions of the parties tend to harden and cases become harder to settle (Tr. 222). CAM's counsel also expressed CAM's belief that, in this case, any motion to enlarge against Mr. Lawhorne would likely preclude any settlement because it would embarrass Mr. Lawhorne, a public official, to have his basic qualifications challenged by anyone (*Id.*).

26. Mrs. Coxwell also testified that neither she nor her counsel ever threatened during the conference call to file a motion to enlarge "unless" Mr. Lawhorne settled with CAM (*Id.*). Mrs. Coxwell explained that CAM had received certain information about Mr. Lawhorne's activities and that, if certain further details were developed at Mr. Lawhorne's forthcoming deposition, the CAM planned thereafter to file a motion to enlarge against Mr. Lawhorne's application (*Id.*).

27. CAM's June 18, 1990, written settlement proposal (CAM Ex. 9, Attachment), was requested by Mr. Eisen at the conclusion of the June 13, 1990 conference call (*Id.*). Mrs. Coxwell testified that, although Mr. Lawhorne arrogantly had said that he saw no chance to settle the case, his counsel asked CAM's counsel to draft a written settlement proposal (*Id.*). When CAM's counsel asked whether Mr. Lawhorne would accept a settlement that proposed Mrs. Coxwell as one of the managers of the radio station, Mr. Eisen stated that CAM should propose what it wanted and Mr. Lawhorne would study it (*Id.*, pp. 2-3). Mr. Lawhorne then repeated his opposition to a merger or to being bought out (*Id.*, p. 3). Mr. Eisen stated that CAM should move promptly because motions to enlarge were due Monday, June 25, 1990, and that Lawhorne planned to file a motion to enlarge against CAM (*Id.*).

28. On June 25, 1990, Lawhorne filed a "Motion to Enlarge Issues" against CAM, just as Lawhorne's counsel had stated during the June 13, 1990 conference call that he would. The motion sought (i) site availability and (ii) abuse of process issues against CAM. The "abuse" issue was premised on Lawhorne's contention that CAM had threatened to file a motion to enlarge against Lawhorne "unless" Lawhorne settled the case.

29. Subsequent to Mr. Lawhorne's deposition, on September 20, 1990, CAM filed a motion to enlarge against Lawhorne, which ultimately was denied by the former Presiding Judge. The following year, after Mr. Lawhorne was arrested on seven (7) felony warrants, CAM filed another motion to enlarge issues, which also was denied by the Commission.[3]

30. In a *Memorandum Opinion and Order*, FCC 90M-2335, released August 2, 1990, former Presiding Judge Kuhlmann added an "abuse of process" issue against CAM on the basis that "CAM does not deny that it told Lawhorne that unless he settled it would reveal damaging

[2] Lawhorne Exhibit 2 appears not to have been moved into evidence.

[3] Although the FCC overturned both the ALJ's and the Review Board's determination that Lawhorne did not violate Section 1.65 by failing to report his arrest, the FCC held that the reporting infraction by Lawhorne was not decisional.

information about him (*Id.*, p. 2). Because CAM absolutely had denied that it had made such a threat to Lawhorne, CAM filed a "Request for Clarification Or, Alternatively, To File Interlocutory Appeal" with the Judge on August 7, 1990, which subsequently was denied by former Presiding Judge Kuhlmann.

31. Mr. Lawhorne was not required to appear for cross-examination at the hearing, consequently the quality of his candor was not assessed.

32. Mrs. Coxwell did appear and testified extensively on the issue. Her testimony was presented in a straight forward manner. She possessed a good command of the facts and appeared to be candid. Her testimony is considered to be trustworthy.

Ownership Issue - CAM-Broadcasting, Inc.

33. CAM is a Georgia corporation formed on May 5, 1988 (CAM Ex. 1, p. 1). CAM's Articles of Incorporation provide that, of its 1000 authorized shares, 33 and 1/3 percent be issued as voting stock and 66 and 2/3 percent be issued as non-voting stock (*Id.*).

34. Mrs. Lyra M. Coxwell is CAM's president, secretary/treasurer and sole voting shareholder (*Id.*). She has paid for and been issued a stock certificate for 333 and 1/3 shares of CAM's Class A voting stock (*Id.*).

35. On or about February 1, 1991, Dr. Russell A. Acree purchased $333 and 1/3 shares of CAM's Class B non-voting stock from his son, Randall S. Acree, Esq. (*Id.*). That purchase of stock was reported to the FCC by an amendment to CAM's application, filed February 21, 1991 (*Id.*).

36. After paying for 333 and 1/3 shares of CAM's Class B non-voting stock, Dr. Frederick L. McLean was issued a stock certificate by CAM on or about August 20, 1990.

37. Dr. McLean is a physician who practices in Sylvester, Georgia and who uses Worth County Hospital as his primary hospital of admission (Tr. 82). Dr. Acree testified that he was a participant in a conversation when Dr. McLean first decided to invest in CAM, and that the latter knew that Dr. Acree had previously owned radio stations, agreeing that the Sylvester facility would be a good investment (Tr. 82-83).

38. At hearing, Mrs. Coxwell explained that she knows Dr. McLean, works with him at the local hospital.

39. In his February 5, 1992 Conditional Motion to Reopen the Record and Enlarge Issues, Lawhorne asserted that Dr. Frederick McLean was no longer a CAM shareholder and that CAM had violated FCC rules and lacked candor by allegedly failing "to disclose Dr. McLean's withdrawal." In an attached, February 3, 1992 "Declaration" (CAM Ex. 6), Lawhorne asserted that his communications counsel and he "both had discussions" with Dr. McLean in October 1991, through which they learned that Dr. McLean "was fed up with the proceeding and that he intended to turn in his stock." Also attached to Lawhorne's Conditional Motion was an undated "Declaration" of Dr. Frederick McLean, which stated in part: "For various reasons, I have determined no longer to be a CAM-Broadcasting, Inc. owner. In this regard, or about before December 31, 1991, I alerted the corporation that I no longer wished to participate. Hence, I am no longer obligated to provide any funding whatsoever for the prosecution of the FM application."

40. Mrs. Coxwell testified that Dr. McLean had never told her that he wished to terminate his ownership in CAM, but that in any event, Dr. McLean had taken none of the actions required under CAM's bylaws to sell, transfer or dispose of his stock interest in the corporation (CAM Ex. 1, p. 2, Appendix B). Moreover, she thinks that he is fully liable for 1/3 of CAM's incurred expenses, and will be until he takes the proper steps under the bylaws and the corporation's buy sell agreement (CAM Ex. 1, p. 2, Appendix C).

41. In her Opposition to the above-stated Conditional Motion to Reopen the Record and Enlarge Issues, Mrs. Coxwell further stated that, although she had been told that Dr. McLean had inexplicably given his unendorsed stock to her husband (Loron Coxwell), Dr. McLean had failed to take any of the legal steps that were required if he truly wanted to dispose of his stock interest in CAM and expressly detailed the legal steps that Dr. McLean should take to dispose of his stock. She concluded: "At this point, I will take no action as CAM's president regarding Dr. McLean's stock until and unless I receive appropriate notices from him in writing."

42. When the Commission subsequently granted Lawhorne's application and denied CAM's application,[4] it dismissed as moot Lawhorne's "Conditional Motion" seeking to add issues regarding the status of CAM shareholder Dr. Frederick McLean.

43. After the Court of Appeals granted the FCC's post-argument request for a "voluntary" remand to set aside CAM's dismissal, Lawhorne filed a Motion to Enlarge Issues on September 21, 1994. That motion sought to add issues against CAM, regarding Dr. McLean, that first had been requested in Lawhorne's 1992 "Conditional Motion." Lawhorne's 1994 motion argued that CAM had never amended its application "to report Dr. McLean's departure." (*See* Motion, p. 2).[5]

44. In CAM's September 30, 1994 "Opposition to Motion to Enlarge," Mrs. Coxwell declared that, since Dr. McLean had declined to take any of the steps legally necessary to end his formal relationship with CAM, she is "continuing to carry Dr. McLean on the corporate books as a CAM shareholder" and she considers Dr. McLean to be "fully liable" for his one-third share of corporate expenses.

45. On October 18, 1994, CAM filed a Supplement to its Opposition, which contained as Appendix A thereto an October 12, 1994 letter to Mrs. Coxwell from attorney Clarence A. Miller, on behalf of "Dr. Fredrick [sic] McLean." (Lawhorne Ex. 8). The Miller letter stated, *inter alia*, that Dr. McLean surrendered his stock certificate to Mrs. Coxwell's husband in "the latter part of 1991" allegedly because he considered it "worthless" and that he would make no further contribution to the corporation (*Id.*).[6] CAM's October 18, 1994 Supplement noted that the

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[4] *See Thomas W. Lawhorne*, 7 FCC Rcd 4341 (1992).

[5] The September 1994 motion also sought the addition of issues against CAM concerning non-voting shareholder Dr. Russell Acree (*see* discussion, *infra*.).

[6] Although the Miller letter also requested that Mrs. Coxwell provide certain corporate documents, Mrs. Coxwell testified at hearing that she never mailed those documents because she knew that Dr. McLean already had been provided copies (Tr. 209-11).

October 12, 1994 Miller letter was the first communication to CAM "from or on behalf of CAM shareholder Dr. McLean" since Lawhorne first questioned Dr. McLean's shareholder status in 1992.

46. On October 27, 1994, Mrs. Coxwell responded in writing to attorney Miller's letter of October 12, 1994 (CAM Ex. 1, Appendix A). She therein advised Mr. Miller that she had been aware of Dr. McLean's deposit with her husband of his unendorsed stock certificate. She also explained that, because Dr. McLean and his family had a longstanding friendship with her family, she concluded to merely withhold any formal corporate action and to allow Dr. McLean to continue to participate in CAM until either (i) such time as CAM gets a CP for the FM station and Dr. McLean pays his past-due share of expenses or (ii) Dr. McLean formally terminates his relationship with CAM (*Id.*). Her letter concluded by stating that if Dr. McLean "is sure he wants to end his relationship with CAM Broadcasting, Inc., now all he needs to do is to sign his stock certificate and a release for CAM." (*Id.*).[7]

47. Neither Mrs. Coxwell nor any other CAM official has received any response to Mrs. Coxwell's letter of October 27, 1994 (CAM Ex. 1, p. 2). Neither Mrs. Coxwell nor any other CAM official has received either an endorsed stock certificate or a release from Dr. McLean (*Id.*). Mrs. Coxwell understands that, under Georgia law, Dr. McLean is legally still a CAM shareholder (*Id.*). She understands that, in order for him to cease being a CAM shareholder, he must endorse his stock certificate (Tr. 201). Mrs. Coxwell considers Dr. McLean to be currently liable for one-third of CAM's expenses, which she has been advancing for both of the non-voting shareholders (*Id.*).

48. Mrs. Coxwell also testified at hearing that she had tried to speak to Dr. McLean about his status with CAM several times at the hospital where they both work but he responded that he didn't have time to talk about it (Tr. 197).

49. Mrs. Coxwell's husband, Loron Coxwell, testified that he has had other business relationships with Dr. McLean and has observed Dr. McLean to become frustrated and impatient but later to reverse himself even after he has made contrary statements (Tr. 120-1).

Failure to Report/Candor Issue - CAM-Broadcasting, Inc.

50. Dr. Russell A. Acree of Adel, Georgia has owned one-third of CAM's equity through his purchase of 333 and 1/3 shares of CAM's Class B non-voting stock from his son, Randall Acree, on February 1, 1991 (CAM Ex. 1, p. 1).

51. Dr. Acree is the owner of Worth County Hospital in Sylvester, Georgia. Loron Coxwell is employed as that hospital's Administrator and Mrs. Coxwell is secretary to the Administrator (Tr. 61-62, 94-95). Mrs. Coxwell's secretarial duties include answering the telephone, directing incoming telephone calls, typing letters and generally implementing the Administrator's wishes (Tr. 62). She is also in charge of payroll and in charge of personnel (Tr. 98). As Administrator Loron Coxwell is ultimately responsible for personnel, and meets with departmental heads at least once a month, reporting directly to Dr. Acree approximately 6 to 12 times a week (Tr. 64-65, 96). Sometimes, these meeting are face-to-face, ordinarily at other hospitals owned by Dr. Acree in Adel, Ocilla, Waynesboro, McRae, and Hahira, Georgia (Tr. 64-65). There are approximately 110 employees and 50 beds at Worth County Hospital (Tr. 69).

52. Worth County Hospital, Inc. is the corporate owner of the Sylvester hospital. Loron Coxwell owns approximately 12 percent and is secretary of that corporation, while Dr. Acree owns a majority of the stock, is a director and an officer (Tr. 66-67, 97-98). Dr. Acree is a board-certified medical doctor with a specialty in family practice (Tr. 67). At the end of 1993 to the middle of 1994, Dr. Acree maintained an office in a professional building behind the hospital and worked at the hospital one day a week pursuant to medical privileges at the hospital (Tr. 68-69).

53. Dr. Acree received a Notice of Hearing issued by the Composite State Board of Medical Examiners, State of Georgia on May 12, 1994 (Lawhorne Ex. 3, Appendix A; Tr. 72). Dr. Acree testified that the notice of hearing was intended to apprise him of the fact that he was to have a hearing before the Composite State Board of Medical Examiners (Tr. 72-73).

54. Dr. Acree was not certain whether or not the Notice of Hearing was made available to the public in South Georgia (Tr. 74). However, after the information in the notice was made available through the release of the Consent Order, the underlying facts appeared in the south Georgia media, including radio, television and newspapers (Tr. 73-74). The hearing on Dr. Acree's license was to determine issues relating to, *inter alia*, the possible commission of a crime involving moral turpitude and/or unprofessional, unethical, deceptive or deleterious conduct that might be harmful to the public (Lawhorne Ex. 3, Appendix A, pp. 4-5). The allegations included violations of various Georgia state laws addressing the prescription of controlled substances, and the obtaining of controlled substances through misrepresentation, fraud, forging, deception, subterfuge, or theft (Lawhorne Ex. 3, Appendix A, pp. 7-8). The particular matters encompassed allegations that Dr. Acree violated the laws and rules of the Board, the Federal Government and the State of Georgia, by writing and filling prescriptions for Demerol, a controlled substance, in the names of decease patients, and that he diverted the drug for his own personal use as well as to others for their illegitimate personal/non-medical use (Lawhorne Ex. 3, Appendix A. pp. 9-10).

55. Lawhorne Ex. 3, pp. 1-12 constitutes the Consent Order entered into by the Composite State Board of Medical Examiners and Dr. Acree on August 4, 1994. The Consent Order affirmed that Dr. Acree had violated the laws and rules of the Board, the Federal Government and the State of Georgia. The Board ordered that Dr. Acree's license be placed on probation, and that among other directives he supply a copy of the Consent Order to each hospital or other institution in Georgia where he maintains staff privileges of any kind, and to any person with whom he is associated in practice (Lawhorne Ex. 3, pp. 2-7).

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[7] Mrs. Coxwell testified that, at this point, she wants Dr. McLean to sign a "release" so that, in the future, he cannot claim rights as a CAM shareholder (Tr. 201). Her request at this point for a release is based on her past investment experiences with Dr. McLean (Tr.202-3). She consulted with her FCC counsel before deciding that she should obtain a release from Dr. McLean (Tr. 271).

56. Dr. Acree testified that after the Consent Order had become public knowledge, he gave Loron Coxwell a copy of the document, explaining to Mr. Coxwell that a copy of the Consent Order should be on file at the Worth County Hospital (Tr. 75). Dr. Acree recalled no direct discussion with Mrs. Coxwell (Tr. 77-78).

57. When Mr. Coxwell received the Consent Order, he made copies of the Consent Order, made it available to the medical staff, and put it in the relevant credentialing file at the hospital, which includes the practitioner data bank information (Tr. 130). He testified that the credentialling file was under the charge of Dorothy Layfield (Tr. 134).

58. Mr. Coxwell was unable to state whether or not employees at the hospital was aware in August 1994 that the State Board of Medical Examiners had released the Consent Order (Tr. 130-131). He was aware that the story ran on an Albany, Georgia television station during a newscast, but he was not sure of the date (Tr. 132-133). Mr. Coxwell testified that he had not discussed the Consent Order with his wife, Lyra, but only with the hospital department heads (Tr. 133-134). He further testified that his wife had not discussed the Consent Order with him even as of the date of hearing (Tr. 134). He was unsure as to what Mrs. Coxwell knew about the Consent Order (Tr. 135).

59. Mrs. Coxwell testified that she first saw copies of the May 12, 1994 "Notice of Hearing" and the August 4, 1994 "Consent Order," involving CAM shareholder Dr. Russell Acree, when she was provided a copy (by her counsel) of Lawhorne's September 21, 1994 Motion to Enlarge Issues (CAM Ex. 3, p. 1). She saw those two documents again when she reviewed a copy of Lawhorne's November 29, 1994 Request for Admissions of Fact and Genuineness of Documents ("Request") (*Id.*). Mrs. Coxwell explained during her cross-examination at hearing that, although she serves as secretary to the Administrator of the hospital, she is "one of the last people" to know what other employees may discuss among themselves in little groups (Tr. 237. Mrs. Coxwell further testified that the only time that she has even asked her husband about Dr. Acree's Consent Decree is after her FCC counsel sent her a copy asking about it (Tr. 238). When she got a copy, she first called her counsel to ask him what it was; when he did not know, she hung up the phone and asked her husband about it (Tr. 238). She testified that her husband told her that he could noth) discuss it with her (*Id.*). She also confirmed that she had not heard about the Consent Decree in any news reports prior to having it provided to her by CAM's FCC counsel (Tr. 238-9).

60. Mrs. Coxwell testified that, if she had known about the Consent Order before Lawhorne disclosed it, she would have reported it to the FCC (Tr. 239).

61. On February 3, 1995, CAM filed a Petition for Leave to Amend and an Amendment reporting information about a sealed indictment that was returned by a federal grand jury the prior week against Dr. Russell Acree, one of CAM's non-voting shareholders. The Amendment further reported that, based on information provided by Dr. Acree's personal lawyer, W. Emory Walters, Dr. Acree entered a plea of "Not Guilty" to federal charges involving the drug Demerol, which was the subject of the Consent Decree that Dr. Acree signed last year with the State of Georgia Medical Board. The Amendment also reported that Dr. Acree had been arraigned on February 2, 1995 and signed his own uncollateralized bond before being released without restrictions by the federal magistrate.

CONCLUSIONS OF LAW

Financial Qualifications/False Certification Issue

62. CAM's claim of having available to it $200,00 in liquid assets to construct and operate its proposed station for three months is belied by the testimony of the president of Adel Banking Company, Richard Tebeau, who issued CAM's bank commitment letter. At transcript, page 153, the following colloquy between Lawhorne's counsel Bruce Eisen and Mr. Tebeau is recorded.

> Q At the time you signed this May 4, 1988, letter, did the bank have a present firm intention of providing CAM-Broadcasting, Inc., with the $200,000?
>
> A Did we have what?
>
> Q A present firm intention to provide that $200,000 to CAM?
>
> A No. It was not a firm--it was a willingness to pursue the matter based on them getting a license and providing the information that would be associated with a loan request.
>
> MR. EISEN: That's all.

63. Despite this testimony, CAM argues that the Adel Bank commitment letter is *bona fide* and not merely an accommodation letter, the type which the Commission considers insufficient to establish financial qualification. CAM argues that the Adel letter constituted reasonable assurance of adequate committed funds because it states a specific interest rate, specific repayment terms and specific collateral requirements. Additionally, CAM notes that the Bank was familiar with two of CAM's three "equal-equity" investors and that Mr. Tebeau testified that the Bank has a "long and established relationship with one of them."

64. The Commission has defined what it means in its requirement that an applicant possess reasonable assurance of committed funds from a lending institution. In *Scioto Broadcasters, Limited Partnership*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1893 (1991), the Review Board stated that the following factors:

> (1) Whether the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plans and similar data, or (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with the financial information (*e.g.*, collateral guarantees), that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan. . . . Short of these ordinary fundamentals, it would be difficult to infer 'reasonable assurance' from a 'committed source.' In other words, central to any successful 'reasonable assurance' showing of a loan from a financial institution is that the 'individual qualifications' of the borrower have been preliminarily reviewed, that adequate collateral has been demonstrated, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. [Citations omitted.]

65. The Commission decries accommodation letters which may on their surface contain boilerplate detail (as to interest rates, etc.), but are no more than official-sounding invitations to someday apply for a loan. See *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6322 (Rev. Bd. 1990).

66. A review of the record indicates that Mrs. Coxwell never met Mr. Tebeau, but that on May 3, 1988, she had two telephone conversations with him. In the first conversation she discussed her FCC application with him and stated her need for reasonable assurance of a loan from his bank to meet her $200,000 budget. Mr. Tebeau in turn stated that he was acquainted with Randall Acree (CAM's 1/3 passive owner) and his father Dr. Russell Acree and that he heard of Dr. McLean (CAM's passive 1/3 owner). Mrs. Coxwell faxed Mr. Tebeau a sample bank commitment letter. Mrs. Coxwell testified that in the second conversation Mr. Tebeau told her the bank would be willing to grant the loan request and that a commitment letter would be issued to her.

67. The record also shows that the bank did not have at the time it issued its commitment letter a banking relationship with either Mrs. Coxwell or Dr. McLean. Randall Acree had some small accounts at the bank but his financial statement was not on file at the bank.

68. Although Mr. Tebeau had never met Mrs. Coxwell, he had talked with her in the past about matters concerning an Adel Banking Company loan to Worth County Hospital where she worked as secretary and hospital administrator.

69. At the hearing, Mr. Tebeau disclosed that a reference to Mrs. Coxwell's professional ability and knowledge of business in the commitment letter really did not refer to her, but was simply copied from the sample bank commitment letter.

70. All these disclosures manifest that Mr. Tebeau indeed did not have a present firm intention to provide the requested funds, but only a willingness to pursue the matter further if CAM were to receive a grant herein.

71. The Adel Bank commitment letter is deemed to be an accommodation letter unacceptable according to the Commission's standards (*Mableton, supra*). It fails to meet the requisite test as enunciated in *Scioto, supra*.

72. In light of the above, the financial qualification issue IS RESOLVED AGAINST CAM Broadcasting, Inc. However, there is no record evidence of any attempt to deceive the Commission. Mrs. Coxwell applied at the bank for what she believed would meet the Commission's requirements and supplied all that the bank deemed necessary in order to issue the commitment letter. Evidence of deceit is essential to a make misrepresentation findings. The misrepresentation issue IS RESOLVED IN CAM'S FAVOR.

Abuse of Process Issue

73. Lawhorne maintains that a CAM letter memorializing an earlier conference call between the applicants notes a threat made by CAM in the conference call. CAM disagrees with the interpretation. It appears that each party has given a different version of the conference call that preceded the letter. CAM's position is the more credible.

74. The record shows that in their settlement discussion both CAM and Lawhorne revealed to each other that post-designation motions to enlarge were likely to be filed by each party against the other. A fair analysis of the attendant circumstances is that no threats were intended by either applicant, but that the realities in litigation confrontation were underscored, namely that the filing of petitions to enlarge against a respondent may very well make him ill disposed towards settling the case. It is in the nature of enlargement motions that a petitioner of such motion would believe that the grounds alleged in support of inquiry would, when established, spell bleak prospects for the respondent. Of course trumped up charges are not unheard of. However, it has not been shown here that CAM's allegations to file an enlargement motion were arbitrary and capricious or that Mrs. Coxwell was in any way deceitful.

75. It is deemed that no threats were intended by CAM and none were given. The abuse of process issue IS RESOLVED IN CAM'S FAVOR.

Ownership Issue - CAM Broadcasting, Inc.

76. The evidence adduced on the record shows that Dr. McLean has been a stockholder in CAM since May of 1988. Dr. McLean has never provided CAM with notice of his intention to dispose of his stock as required by the CAM "Buy-Sell Agreement" which he himself signed. Nor has Dr. McLean ever endorsed his stock certificate as required by Georgia law. The record shows that CAM's president had good reason to question the finality of Dr. McLean's "withdrawal" from the corporation and she had repeatedly advised Dr. McLean of how to legally terminate his involvement in CAM. Dr. McLean has done nothing in this regard.

77. It is ruled that CAM has not violated the Commission's reporting rules with respect to Dr. McLean's status because there has been no change in CAM's ownership to report. The issue IS RESOLVED IN CAM'S FAVOR.

Failure to Report/Candor Issue - CAM-Broadcasting, Inc.

78. It appears that Mrs. Coxwell first knew that Dr. Acree had entered into a "Consent Decree" with the State of Georgia Medical Board when she reviewed Lawhorne's September 21, 1994 motion to enlarge issues. Even after she received a copy of the Consent Order (as part of Lawhorne's September 21, 1994 motion) and first asked her husband (the hospital Administrator) about it, Mrs. Coxwell was told that he could not discuss it with her (Tr. 238, 133-5). There is no reason on this record not to credit Mrs. Coxwell's corroborated testimony that she was unaware of the Consent Order until it was disclosed in this proceeding on September 21, 1994 by Lawhorne. Mrs. Coxwell testified that if she had known about the Consent Order before Lawhorne disclosed it in this proceeding, she would have reported it to the FCC. Moreover, CAM has timely reported Dr. Acree's subsequent (sealed) indictment by a federal grand jury and his entry of a plea of "Not Guilty" on February 2, 1995. *See* Amendment, filed by CAM on February 3, 1995 (and accepted by the ALJ on March 1, 1995). Mrs. Coxwell also testified that she wrote Dr. Acree on January 24, 1995, requesting that he notify her personally of any further legal matters that involved him (CAM Ex. 3, p. 2). The issue IS RESOLVED IN CAM'S FAVOR.

ULTIMATE CONCLUSIONS

79. CAM has been found to be financially unqualified and its application has to be denied. With the denial of CAM's application, there is no impediment to the grant of the application of Thomas W. Lawhorne, the sole remaining qualified applicant.

Accordingly, IT IS ORDERED that unless an appeal from this Supplemental Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Thomas W. Lawhorne (File No. BPH-880505OA) IS GRANTED, and the application of CAM-Broadcasting, Inc. (File No. BPH-880505OJ) IS DENIED.[8]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

[8] In the event exceptions are not filed within 30 days after the release of this Supplemental Initial Decision and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re:

MID-STATE TELEVISION, INC. CSR-3798-A
Mansfield, Ohio

For Modification of Television
Broadcast Station WMFD's ADI

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1995; Released: June 26, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Mid-State Television, Inc., licensee of independent UHF Television Broadcast Station WMFD (Ind., Channel 68), Mansfield, Ohio [Mid-State], has filed the captioned petition seeking to include the counties of Knox, Morrow, Crawford, Marion, Wyandot, and Seneca within the Cleveland, Ohio "area of dominant influence" [ADI] for purposes of the cable television mandatory broadcast signal carriage rules. Oppositions were filed by Time Warner Cable [Time Warner]; Mount Vernon Cablevision, Inc. [Mount Vernon]; Cannel Communications, L.P., licensee of Television Broadcast Station WUAB (Ind., Channel 43), Lorain, Ohio [Cannel];[1] Outlet Broadcasting, Inc., licensee of Station WCMH-TV (NBC, Channel 4), Columbus, Ohio [Outlet]; WTTE, Channel 28 Licensee, Inc., licensee of Television Broadcast Station WTTE (Ind., Channel 28), Columbus, Ohio [WTTE]; Continental Cablevision of Ohio, Inc. [Continental Cable]; Continental Broadcasting, Ltd., licensee of Television Broadcast Station WSYX (ABC, Channel 6), Columbus, Ohio [Continental]; Times Mirror "Cable Television of Delaware County, Inc. [Times Mirror]; and Chillicothe Cablevision, Inc. Subsequently, Mid-State filed a modification of its petition for special relief, to which Mount Vernon and Starpoint Cable [Starpoint] filed responses. Mid-State also filed a reply to the oppositions.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

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[1] Cannel's "Comments" express no opinion on the merits of the petition. Rather, Cannel requests that should the Commission grant petitioner's request, WMFD's rights to mandatory carriage within the Cleveland, Ohio ADI be limited to five named counties. We agree with Mid-State's argument that Cannel's comments are not responsive to the petition, and would more properly be the subject of a separate petition for special relief.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-77 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
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> * * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided the following guidance in the *Report and Order* to aid decision making in these matters:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. In its petition, Mid-State requests that the Commission modify WMFD's ADI to include Knox, Morrow, Crawford, Marion, Wyandot, and Seneca Counties in the station's ADI market of Cleveland, Ohio. In support of its request, Mid-State claims that WMFD is "the *only* full-service commercial television station programming primarily for this service area" (emphasis in original). Petitioner contends that although the station has been carried by some of the cable systems in the requested counties, without must-carry status, WMFD may be deleted by these systems. Mid-State contends that as a "relatively new independent UHF station providing the type of local programming that Congress has focused upon," it needs must-carry status throughout its service area to reach cable subscribers with its programming.

9. Petitioner states that WMFD's city of license, Mansfield, Ohio, is located in the southernmost county of the Cleveland, Ohio ADI, 65 miles southeast of Cleveland. Mansfield is 65 miles northeast of Columbus, the principal city of the Columbus, Ohio ADI, and 70 miles southeast of Toledo, the principal city of the Toledo, Ohio ADI. Mid-State continues that the WMFD service area includes all or part of the southern half of the Cleveland ADI, plus all or part of the northernmost counties of the Columbus, ADI and two of the southeastern most counties of the Toledo ADI. The counties which Mid-State requests to be added "represent about one-half of WMFD(TV)'s service area" and Mid-State contends that "exclusion [of the requested counties] from our must-carry list would be devastating." Petitioner states that WMFD is the only commercial full-service station licensed in the service area, excluding those

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[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97-98 (1992).
[7] 8 FCC Rcd at 2977.
[8] *Id.* at n.139.
[9] 47 C.F.R. §76.59.
[10] 8 FCC Rcd at 2981.

stations licensed to and located in the principal cities of the three ADI designations. Mid-State believes that WMFD is entitled to carriage in the requested areas "if for no other reason than our over-the-air signal is available to over-the-air viewers in the same geography and thus should not be excluded with artificial barriers." Additionally, petitioner contends that the station's programming is directed to the requested area and that its unique local programming is not provided by any other full-power commercial television service. In support, Mid-State describes its weekday evening programming (5 p.m. to 12 a.m.) as locally produced area news, weather, public affairs and children's programming. It contends that WMFD is the only television station within the service area to have a full-time weather person on staff and on site at the station. In addition, Mid-State has supplied the Commission with a list of programming it contends has particular interest to the counties relevant to its petition. Petitioner concludes that it seeks relief because of the station's unique geographic location on the border of three Arbitron ADI designations. It contends that without such relief, WMFD will be deprived of the ability to serve a substantial portion of its service area.

10. Time Warner, as well as the other opponents [collectively, "Opponents"], argues that the 1992 Cable Act and the Commission's *Report and Order* require that petitions to modify an ADI do so on the basis of adding individual cable communities, rather than Mid-State's request to add six counties. Time Warner adds that the petition in no way discusses the local nature of WMFD's programming as it relates to the approximately ninety-nine individual cable communities in the six named counties. Time Warner argues that Congress' concern was to ensure that stations not lose their existing cable audience in individual cases because of the new ADI boundaries, and that the Commission should not allow a station to claim its service area as a measure for must-carry status. Time Warner argues that Mid-State is attempting to use the Commission's special relief process to redefine and "attack the entire ADI concept," as opposed to adding specific communities pursuant to the statute and the rules. Opponents contend that Mid-State's assertion that "[w]e are currently on cable systems within Knox, Morrow, Crawford, and Marion Counties within the requested area" is vague and provides no specific information regarding carriage on individual cable systems. Outlet points out that Mid-State contends in its petition, without benefit of detail, that WMFD "has been excluded by some of the cable systems within its service area." Time Warner, Times Mirror, Continental Cable, and Mount Vernon state that their systems in the requested counties do not carry WMFD and have never done so. According to Times Mirror, WMFD has historically been carried by only one cable system in either Marion or Wyandot Counties, and that system (SCI, in Caledonia, Ohio) serves approximately 400 households.

11. In regard to Mid-State's claim that WMFD's programming is geared to the local counties it seeks rights to, Opponents generally state that Mid-State has failed to establish that its programming meets the burden established by Congress or the Commission. Opponents argue that the Cable Act and our rules specify that such programming must be of local interest to specific cable communities, and not of county interest, as designated by Mid-State. Time Warner argues that Mid-State has provided no specific evidence in the form of program logs, and that its list of programming aired between 1992 and 993 shows a *de minimis* average of one program per county per year. Continental Cable points out that all of the programming listed for Seneca County was aired within approximately two weeks of Mid-State's filing of the petition, and that two of the three listed events for that county were broadcasts of high school sports coverage. Further, Continental Cable contends that WMFD apparently covered election results in only one of the six requested counties in November 1992, and that of the 19 local news items supplied by Mid-State in the petition, almost one-third could be classified as "feature" stories. Continental concludes that WMFD has not demonstrated a commitment to coverage of significant local issues. Further, Times Mirror contends that WMFD's claimed seven hours of local programming each weekday evening is merely one hour of programming which is repeated for six additional hours each evening in a "news wheel" format.

12. In regard to Mid-State's contention that WMFD's programming is unique to the area where it requests carriage, Opponents contend that Knox, Morrow, Crawford, and Marion Counties are currently served by television stations which provide significant coverage of local news, sports and weather programming. WTTE states that WTTE, WSYX, WCMH-TV, and Station WBNS-TV (CBS, Channel 10), Columbus, Ohio, each provide Grade B coverage to the four counties, and that these counties are "well served by the existing stations in the market." Opponents contend that Mid-State has failed to submit any audience or viewing data for WMFD or any other station in the counties in which it seeks must-carry rights.

13. Subsequent to these oppositions, Mid-State filed a modification of its petition, in which it requests that the relief it seeks for modification of WMFD's ADI be granted on a community-specific basis, rather than on a county-wide basis. Specifically, Mid-State requests that it be granted must-carry status in the following twenty communities: Fredericktown, Mount Vernon, Centerburg, Danville, and Gambier (Knox County); Mount Gilead, Cardington, and Marengo (Morrow County); Marion, Caledonia, and Morral (Marion County); Galion/Crestline, Bucyrus, and New Washington (Crawford County), Tiffin, Bloomville, Attica, and Bellevue (Seneca County); and Upper Sandusky and Sycamore (Wyandot County).

14. In response to Mid-State's modification, Starpoint contends that WMFD has never been carried on cable systems in Centerburg and Gambier, both located in Knox County, and that it has provided no evidence of programming devoted to those communities. Starpoint contend that the record in this matter demonstrates that other broadcasters have provided more coverage of Knox County news than WMFD. Starpoint continues that Mid-State has provided no community specific information or Arbitron data regarding WMFD's viewership in Knox County. Starpoint concurs with Mount Vernon's argument that WMFD's viewership in Knox County is so low that the station was not be listed in Arbitron's 1993 *County Coverage Report* for Knox County, and states that it would be "irrational" to grant must-carry rights without considering whether viewers watch the station seeking to expand its mandatory carriage rights.

15. In its reply to the oppositions, Mid-State contends that since it has altered its petition to be community-specific, opponents' arguments regarding Mid-State's initial county-wide requests have been rendered moot. Mid-State continues to assert that WMFD provides "substantial" local programming, not only for Mansfield, but also for the

surrounding communities, and claims that WMFD "would compare its local service to any station in the area." Mid-State provides the Commission with a list of programming broadcast between June 1, 1992 and May 18, 1993, which it entitles, "Ninety Examples of News and Sports Stories/Programs from Hundreds and Hundreds." A breakdown of the ninety programming examples as it relates to individual communities and/or counties is as follows:[11] Knox County - 8; Fredericktown - 1; Mount Vernon - 4; Centerburg - 0; Danville - 0; Gambier - 1; Morrow County - 6; Mount Gilead - 5; Cardington - 0; Marengo - 0; Marion County - 7; Marion - 9; Caledonia - 1; Morral - 0; Crawford County - 10; Galion/Crestline - 28; Bucyrus - 14; New Washington - 1; Seneca County - 1; Tiffin - 0; Bloomville - 0; Attica - 0; Bellevue - 0; Wyandot County - 1; Upper Sandusky - 2; Sycamore - 0. In regard to opponents' contention that Mid-State has provided no specific audience data, Mid-State, while conceding that opponents are correct "to a degree," claims that this omission is not fatal. Petitioner contends that no one factor forwarded by Congress and the Commission is a *sine qua non* for grant. Mid-State explains that it has been operating the station with its current facilities only since August, 1992 as a new independent UHF station, and contends "there is little wonder" that WMFD did not fare well in the July, 1992 - November, 1992 Arbitron ratings. In regard to specific carriage, Mid-State states that WMFD is carried on cable systems in Fredericktown, Mount Gilead, Cardington, and Bucyrus, and that Mid-State's Channel 50 "translator" is carried on the Caledonia and Galion/Crestline cable systems. Mid-State concludes that WMFD is "exactly the type of station that Congress intended to protect," and again requests that must-carry rights be afforded to WMFD in the communities specified in its modification.

ANALYSIS AND DECISION

16. Based on the information contained in the pleadings, and then applying the four factors set out in the Cable Act, we grant in part and deny in part Mid-State's petition. The first factor involves historical carriage of the television broadcast stations by cable systems in the requested communities. According to Mid-State's reply, WMFD has been carried on cable systems serving the communities of Fredericktown, Mount Gilead, Cardington, and Bucyrus, and Mid-State's Channel 50 "translator"[12] is carried on the Caledonia and Galion/Crestline cable systems. Mid-State provides the Commission with no documentation in support of its carriage claim, but it is uncontested that the earliest carriage of the station would have been in June of 1992, when WMFD began operating pursuant to the Commission's grant of Special Temporary Authority.

17. The second factor determined by Congress involves coverage or other local service by the station to the requested community. Mid-State has narrowed its examples of local programming to community-specific programming aired from June 1, 1992 through May 18, 1993. Although it claims that its ninety examples of locally oriented programming are distilled from "hundreds and hundreds" of programs aired during the period, we must limit our analysis to the facts before us on the record. Of the twenty communities requested by Mid-State, petitioner supplies us with programming examples for ten of the named communities. The combined communities of Galion and Crestline are covered by twenty-eight programming examples for the period. Of the remaining communities, Bucyrus has more than ten examples, and Marion and Mount Gilead between five and ten examples. The remaining six communities have less than five specific programming examples for the eleven and one-half month period, and ten communities requested by Mid-State to be added to its ADI are not represented in the examples provided. In addition, the list of representative programming includes thirty-three programs designated by county which could be of interest to residents of all communities within the county.

18. In determining whether a station provides coverage or other local service, the *Report and Order* states that a petitioner may also demonstrate that the station provides at least Grade B coverage to the communities in question, or show a mileage proximity between the television station and the cable communities. Mid-State provides an exhibit setting out WMFD's Grade B contour,[13] without providing further detail as to the specific communities encompassed by the contour, or the mileage proximity of the station to the cable communities in question. According to the *Cable & Station Coverage Atlas*, 1995 Edition, Warren Publishing Inc., and WMFD's predicted coverage contour map contained in the station's filings with the Commission, it appears that of the twenty communities requested in Mid-State's modification, only Tiffin, Bellevue,[14] and Upper Sandusky are clearly outside of the Grade B contour. In addition, we take note of the fact that according to the *Television & Cable Factbook*, Stations Volume No. 63, 1995 Edition, Warren Publishing Inc., and the contour map on file with the Commission, that the communities of Galion/Crestline, Bucyrus, Mt. Gilead, and New Washington are within WMFD's City Grade contour, and that the communities of Attica, Fredericktown, Cardington, and Caledonia are within the station's Grade A contour, which extends approximately twenty five miles from Mansfield.

19. The third factor to be analyzed concerns the availability of programming of interest to the communities in question by television stations, other than WMFD, which have mandatory carriage rights on cable television systems serving said communities. In this regard, Opponents have provided general information regarding Grade B coverage to the four counties in the Columbus ADI and no specific information regarding programming provided to specific communities named in Mid-State's modification.

20. The fourth factor set out in the Cable Act is evidence of viewing patterns in cable and noncable households in the cable communities. Mid-State has provided the Commission with no information in this regard, although

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[11] Some of the programming applies to more than one county and/or community and has been applied as such.

[12] W50BE, licensed to Mid-State Television, Inc., Mansfield, Ohio, is described in Mid-State's reply as both a translator and a low power television station. In fact, W50BE is licensed by the Commission as a low power television station. Since petitioner had provided the Commission with no information regarding the programming of W50BE, we cannot assume that its programming is identical to that of WMFD, as it would be if W50BE were licensed as a translator.

[13] Mid-State's Grade B contour exhibit is of such poor quality that it is difficult to determine whether the communities named in the modification fall within WMFD's Grade B contour.

[14] Bellevue is located in both Huron and Sandusky Counties and not in Seneca County as claimed by Mid-State.

Arbitron has conducted five ratings periods since WMFD began broadcasts in June 1992 under Special Temporary Authority of the Commission.

21. Evaluating the facts and circumstances in this case, we are convinced that Mid-State has sufficiently justified its request to add the communities of Fredericktown, Mount Gilead, Cardington, Bucyrus, Galion/Crestline, New Washington, Caledonia, and Attica to WMFD's Cleveland, Ohio ADI. Mid-State has demonstrated both historical carriage and at least Grade B coverage in the first four communities, satisfying the first and second statutory factors. However, since Mid-State has provided no information regarding the programming of low power television station W50BE, vis-a-vis the programming of WMFD, we cannot recognize WMFD as having historical carriage on the cable systems serving Caledonia and Galion/Crestline. However, in regard to Galion/Crestline, New Washington, Attica, and Caledonia, we believe that since these communities are so proximate as to be within the twenty five mile Grade A coverage area of the station, satisfaction of the second factor is strong enough to stand on its own, absent evidence to counter such a strong presumption for modification. Although WMFD provides at least Grade B coverage to an additional nine of the twenty named communities, Mid-State does not provide information which would satisfy any of the other three factors in regard to these communities. In addition, Mid-State provides the Commission with no information regarding viewership of WMFD. In regard to factor four, we understand that WMFD is a relatively new station and that a lack of comprehensive information for such a station may, in certain cases, be overcome by sufficient information regarding the other relevant factors. However, other than those communities which are so proximate as to qualify for modification on this factor alone, we do not believe that such is the case here.

ORDER

22. In view of the foregoing, we find that grant of Mid-State's petition with respect to the named communities of Fredericktown, Mount Gilead, Cardington, Bucyrus, Galion/Crestline, New Washington, Caledonia, and Attica, Ohio, is in the public interest, but that grant of Mid-State's petition with respect to Mount Vernon, Centerburg, Danville, Gambier, Marengo, Marion, Morral, Tiffin, Bloomville, Bellevue, Upper Sandusky, and Sycamore, Ohio, is not in the public interest.

23. Accordingly, IT IS ORDERED, pursuant to §614(c) of the Communications Act of 1934, as amended, (47 U.S.C. §534) and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the captioned petition for special relief filed by Mid-State Television, Inc. IS GRANTED to the extent indicated in paragraph 23, *supra*, and in all other respects IS DENIED.

24. IT IS FURTHER ORDERED, That this change shall be effective in accordance with the following schedule: WMFD shall notify the cable systems in question in writing of its carriage and channel position elections (§§76.56, 76.57 and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order*.[15]

25. This action is taken by the Cable Services Bureau pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[15] Due to the fact that this portion of the ordering clause was excluded from the original order, the compliance dates for both the system and the station will run from July 13, 1995.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Desert Empire Television Corporation and Gulf-California Broadcast Company — CSR-3571

Joint Request of Palm Springs Stations and Cable System Parties for Approval of Settlement Agreement and for Associated Relief

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1995; Released: June 26, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Desert Empire Television Corporation, licensee of commercial television station KMIR-TV (NBC, Channel 36) and Gulf-California Broadcast Company, licensee of commercial television station KESQ-TV (ABC, Channel 42), both of Palm Springs, California, along with Warner Cable Communications, Inc., Desert Hot Springs Cablevision, Inc., and Colony Cablevision of California[1] (collectively known as "the Stations" and "the Systems") filed the above captioned Joint Request for Approval of Settlement Agreement. KTLA Inc., licensee of commercial television station KTLA (Ind., Channel 5) and KCOP Television, Inc., licensee of commercial television station KCOP (Ind., Channel 13), both of Los Angeles, California, filed separate responses stating that they would not oppose Commission approval of the settlement agreement as it is written.

2. By this filing, the Stations and the Systems seek Commission approval of a final resolution to a long-standing dispute involving the efforts of KMIR-TV and KESQ-TV to enforce network program nonduplication protection and syndicated program exclusivity against seven VHF stations licensed to Los Angeles, California[2] in the Riverside County Central region of California. In connection with this petition and contingent upon its grant, the parties have agreed to modify the substantive positions they have previously taken in this proceeding, and both the Stations and the Systems now support a limited waiver by the Commission of the significant viewing exception to the network and syndicated programming exclusivity rules.

BACKGROUND

3. The Commission's network program duplication rules allow a local television station to require that a cable system delete network programs as broadcast by any other station if the local station holds the nonduplication rights in its market and requests such deletion.[3] The Commission's syndicated program exclusivity rules operate similarly with respect to syndicated programming.[4] These rights may, on proper notification, be asserted through the licensee's specified zone against out-of-market stations.[5] In each case, however, stations that are significantly viewed in a cable system's community of operation are exempt from programming blackout under these rules.[6]

4. The Palm Springs, California, area of dominant influence ("ADI") consists of Riverside County Central, the middle portion of Riverside County, California. KMIR-TV and KESQ-TV are the only two full service television stations licensed to communities in this market. The Systems operate the three major cable television systems in the Palm Springs ADI and other portions of Riverside County.

5. When the Commission issued its 1972 list of "significantly viewed" stations, the seven VHF stations in Los Angeles were included on that list as significantly viewed in Riverside County Central. The Stations and the Systems have subsequently engaged in protracted litigation before the Commission with respect to whether the Los Angeles stations are in fact significantly viewed in Riverside County

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[1] These entities operate cable television systems serving Palm Springs, Desert Hot Springs, and Palm Desert, California, respectively.

[2] The Los Angeles stations include: KCBS-TV (CBS, Channel 2), KNBC-TV (NBC, Channel 4), KTLA (Ind., Channel 5), KABC-TV (ABC, Channel 7), KKJ-TV (Ind. Channel 9), KTTV (Ind., Channel 11), and KCOP (Ind., Channel 13).

[3] Section 76.92(a) states that "upon receiving notification pursuant to §76.94, a cable community unit located in whole or in part within the geographic zone for a network program, the network nonduplication rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal, except as otherwise provided below."

[4] .Section 76.151, the Commission's syndicated program exclusivity rule, states that "Upon receiving notification pursuant to §76.155, a cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal except as otherwise provided below."

[5] *See* 47 C.F.R. §§76.92 and 76.151.

[6] *See* §§76.92(f) ("[a] community unit is not required to delete the duplicating network programming of any television broadcast signal which is significantly viewed in the cable television community pursuant to §76.54.") and 76.156(a) ("Notwithstanding the requirement of §§76.151-76.155, a broadcast signal is not required to be deleted from a cable community unit when that cable community unit falls, in whole or in part, within that signal's grade B contour, or when the signal is significantly viewed pursuant to §76.54 in the cable community.").

For a network station to be considered significantly viewed, it must achieve "off-air" a share of viewing hours of at least 3 percent (total weekly hours) and a net weekly circulation of at least 25 percent. The minimum figures for an independent station are 2 percent and 5 percent, respectively. *See* 47 C.F.R. §76.5(i).

Central and whether, in any event, the significant viewing exception to the network and syndicated program exclusivity rules should or should not be waived so as to require the Systems to comply fully with both rules.

6. In the most recent stages of this litigation commencing in June 1991, the Stations sought waivers of §§76.92(f) and 76.156(a) of the Commission's program exclusivity rules so that they may demand that the local cable system black out programming aired by the Los Angeles television stations carried on the Systems despite their significantly viewed status. In the alternative, the Stations asked that the Commission delete the Los Angeles stations from the Commission's 1972 significantly viewed list. The Chief of the Mass Media Bureau denied the Stations' request, noting that KMIR-TV and KESQ-TV did not submit any "specific justification for departing from our settled policy of not deleting stations from our list of significantly viewed signals."[7] nor did they submit specific audience survey data contemplated by the waiver process set forth in *KCST-TV, Inc.*[8] The Stations then filed an "Application for Review" seeking reversal by the full Commission of the Bureau's decision. The application for review was opposed by the licensees of Los Angeles television stations KCOP and KTLA, who also opposed KMIR-TV and KESQ-TV's initial waiver request.

7. While the application for review remains pending, KMIR-TV and KESQ-TV are receiving partial network and syndicated exclusivity protection under differing formal and informal arrangements with two of the cable systems.[9] On October 1, 1993, the Mass Media Bureau granted a temporary waiver of the significantly viewed exception to permit the existing arrangements to continue pending Commission consideration of the agreement submitted with this petition. No syndicated exclusivity protection is being afforded under this temporary waiver with respect to KCOP and KTLA.

THE SETTLEMENT AGREEMENT AND REQUEST FOR APPROVAL

8. The Systems and the Stations have concluded that a continuation of their dispute serves neither the public interest nor the private interests of the parties. Accordingly, the Stations and the Systems have entered into a long-term comprehensive agreement which resolves all points at issue between them. If approved, the "Agreement" will remain in effect for an initial term of six years unless terminated upon the happening of certain events specified in the agreement. Moreover, any party to the agreement may cause it to be extended for an additional six years, through December 31, 2005. As illustrated below, paragraphs 2 and 3 constitute the core of the agreement.

9. Paragraph 2 of the agreement provides that Stations will amend their July 11, 1991 "Petition for Special Relief" and their pending "Application for Review" to withdraw their request that the Commission delete the seven Los Angeles VHF television stations from the list of stations deemed "significantly viewed" in the Riverside County Central area. Paragraph 2 further provides that Stations' amended filings shall thereafter request only that the "significantly viewed exception" to the Commission's network nonduplication and syndicated exclusivity rules be waived with respect to the signals of Los Angeles VHF stations to the extent necessary to permit implementation of the agreement, or that the FCC take such other action as may be required to permit implementation of the agreement. The Stations and the Systems state that Commission approval of the agreement will eliminate any questions as to whether the "carriage-in-full" provisions of the 1992 Cable Act present a bar to continued voluntary non-duplication arrangements among the parties. Finally paragraph 2 provides that this modification of the Stations' position before the FCC shall be contingent upon FCC approval of the agreement.

10. Paragraph 3 of the agreement provides that the Systems shall withdraw their opposition to waiver of the "significantly viewed exception" to the network non-duplication and syndicated exclusivity rules, and that the Systems shall thereafter support waiver of the exception as may be necessary to enable the Systems to comply with the provisions of the agreement. This paragraph of the agreement further provides that the Systems' modification of their position before the FCC is also to be contingent upon FCC approval and that the waiver is expressly conditioned on continuation of the agreement.

11. According to the parties, the agreement otherwise provides that the Systems will, upon Commission waiver of the significantly viewed exception: (1) provide the Stations with only simultaneous network and syndicated programming exclusivity; (2) that the Stations will broadcast a specified number of promotional spot announcements for the Systems; and (3) that the Stations and the Systems will implement certain measures intended to improve execution of non-duplication switching functions. The Stations and the Systems note that the Desert Hot Springs system is not presently carrying the signals of the Los Angeles NBC and ABC network affiliated stations that duplicate the network programming of KESQ-TV and KMIR-TV. A number of the provisions in the agreement will apply to the Desert Hot Springs system only if the system resumes carriage of either or both of the Los Angeles ABC and NBC network affiliates.

12. The Stations and the Systems assert that Commission approval of the agreement would serve the public interest in several ways. First, the agreement would put an end to a long-standing dispute that has drained the resources of the parties and the Commission. Second, the agreement would result in no loss of television programming, or of time diversity for television programming, for any cable subscriber. Third, the agreement would have no material adverse impact on any other station. In this regard, the Stations and the Systems state that the amount of programming that would be affected is presently very small and is unlikely to be significant in the future. Neither KESQ-TV nor KMIR-TV currently broadcasts any programming that simultaneously duplicates programs of KCOP and KMIR-

[7] *See* 7 FCC Rcd at 4216.

[8] *See* 103 FCC 2d 407, 413 (1986). In this case, the Commission held that a station's significantly viewed status could be rebutted only through the use of system or community specific audience survey data demonstrating a station's failure to achieve the required viewing levels for two consecutive years.

[9] It is important to note that the Desert Hot Springs system is not presently carrying any duplicating network stations from Los Angeles.

TV broadcasts only one half hour of programming per weekday that simultaneously duplicates a program broadcast by KTLA and that simultaneous duplication was scheduled to end in January, 1994. Additionally, the Los Angeles ADI, with nearly five million TV households is much larger than the Palm Springs ADI, which only has a total of about 90,000 households. As such, the provision of a very limited amount of syndicated programming exclusivity by Palm Springs cable systems will not have any material adverse impact on either KCOP or KTLA. The Stations and the Systems conclude by stating that, in view of the compelling public interest considerations presented above, the Commission should approve the attached agreement and waive the significant viewing exception to the network and syndicated exclusivity rules to the limited extent required to permit effectuation of the agreement.

13. KTLA and KCOP, in separate comments, state they will not oppose approval of the agreement. KTLA, however, continues to believe that its status as a significantly viewed signal in Palm Springs is justified and wishes to do everything possible to protect its service to the residents of that area. Thus, KTLA does not agree with the parties that implementation of the agreement will have only a *de minimis* impact upon it and other Los Angeles stations. Nevertheless, KTLA recognizes the limited nature of the relief now requested by the parties and the unique factual circumstance presented by this case. As such, KTLA's acquiescence is contingent upon the terms of the agreement as it is written but reserves the right to object to any expansion of the scope of the agreement or to any additional waivers of the Commission's rules. As for KCOP, it states that while it also disagrees that the agreement has only a *de minimis* impact, it also recognizes that this case is unique, and in order to resolve the dispute, will not object to the agreement as it is written. KCOP also expressly reserves its right to oppose any waiver of the rules other than as set forth in the agreement.

DISCUSSION

14. The keystone of the Stations' past efforts in this matter have been to attain waivers of §§76.92(f) and 76.156(a) of the Commission's program exclusivity rules so that they may demand that the cable systems serving Riverside County Central black out programming aired by the Los Angeles television stations carried on the Systems despite their significantly viewed status. We find the settlement agreement proposed by the parties, which gives the Stations simultaneous network and syndicated programming exclusivity, resolves a prolonged dispute in a manner consistent with the public interest. We accordingly treat the petition for review as a petition for reconsideration, affirm the settlement agreement and waive §§76.92(f) and 76.156(a) of the Commission's Rules, the significantly viewed exceptions, to the extent requested by the parties.[10] The Stations also have repeatedly asked that the Commission delete the seven Los Angeles stations from the Commission's 1972 significantly viewed list. However, as part of the settlement, the Stations have agreed to withdraw this request. As such, we refrain from deleting the Los Angeles stations from our 1972 list of significantly viewed stations.

15. The agreement will not be detrimental to the interests of the viewing public because there is no loss of television programming, or of time diversity for television programming, for any cable subscriber. In addition, this agreement puts an end to a long-standing dispute. This has the beneficial effect of saving Commission resources that would have been required to resolve further controversies in this proceeding. We also find that the provision of a very limited amount of syndicated programming exclusivity by Palm Springs cable systems will not have any material adverse impact on either KCOP or KTLA because the limited nature of the requested waiver and the fact that the Palm Springs television market is significantly smaller when compared to the Los Angeles television market. KCOP and KTLA, which have voiced their opposition to KMIR and KESQ's waiver requests in the past, do not oppose the current settlement agreement. Similarly, no other Los Angeles television station has filed objections.

ORDER

16. Accordingly, IT IS ORDERED, that the Joint Request of Palm Springs Stations and Cable System Parties for Approval of Settlement Agreement and for Associated Relief, finally resolving CSR-3571, filed by Desert Empire Television Corporation, Gulf-California Broadcast Company, Colony Cablevision of California, Warner Cable Communications, and Desert Hot Springs Cablevision, Inc. IS AFFIRMED.

17. IT IS FURTHER ORDERED, that §§76.92(f) and 76.156(a) of the Commission's rules regarding the significantly viewed exceptions to the Commission's network nonduplication and syndicated exclusivity rules, ARE WAIVED to the extent necessary for the settlement agreement to take effect.

18. This action is taken by pursuant to authority delegated by §0.3321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[10] We have held that settlement agreements, at least in the area of comparative licensing proceedings, "are an efficient way to resolve . . . . proceedings, preserve funds for service to the public, and allow [the Commission] to preserve [its] limited resources." *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants*, 4 FCC Rcd 4780, 4784 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Burnham Broadcasting Company CSR-3948-A
Bakersfield, California

For Modification of Station KBAK-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1995; Released: June 26, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Burnham Broadcasting Company, a Limited Partnership ("Burnham"), licensee of Station KBAK-TV (ABC, Channel 29), Bakersfield, California, has filed a petition for special relief seeking to modify its Area of Dominant Influence ("ADI") to establish mandatory carriage rights on the cable systems serving Tulare, Visalia, and Porterville in Tulare County, California and Corcoran in Kings County California. Continental Cablevision of Sierra Valleys, Inc. ("Continental") serves the communities of Tulare, Visalia, and Corcoran. Oppositions to this petition were filed on behalf of Retlaw Enterprises, Inc. ("Retlaw"), licensee of KJEO-TV (CBS, Channel 47), Fresno, California and Continental. In addition, Comments to KBAK-TV's petition were filed on behalf of Pappas Telecasting Incorporated, licensee of KMPH-TV (Fox, Channel 26) Visalia, California. Burnham filed a consolidated reply to the oppositions and the comments.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][1] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the 1992 Cable Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[5] 47 U.S.C. §534(h)(1)(C)(ii).

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided guidance in the *Report and Order, supra*, to aid decision making in these matters, as follows:

> For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. KBAK-TV is a full power commercial television station licensed to Bakersfield, California, in Kern County West, and located in the Bakersfield ADI. Continental Cablevision notified KBAK that the station will be dropped from its cable system serving Tulare and Visalia, and from its system serving Corcoran. Tulare, Visalia, and Porterville in Tulare County, California and Corcoran in Kings County, California are located in the Fresno-Visalia ADI. Using the reference points in §76.53 of the Commission's Rules, Bakersfield is located 67.5 miles from Visalia, 60.2 miles from Tulare, 58.3 miles from Corcoran, and 47.6 miles from Porterville.[11]

9. In support of its petition, Burnham argues that KBAK-TV has been historically carried on Continental and other cable systems serving Tulare, Visalia, and Corcoran, and on the Falcon cable system serving Porterville. Burnham also maintains that the station is close to all of the communities and that Bakersfield is a "natural urban center to which residents of Tulare, Visalia, Porterville and Corcoran come and a corridor through which residents pass." In addition, Burnham contends that KBAK-TV's over-the-air signal is "well-received" in Tulare, Visalia, and Corcoran, and that its Grade B contour encompasses the community of Porterville and extends into both Tulare and Kings County where the other communities are located. Furthermore, Burnham asserts that it has traditionally reported news and events regarding the communities. In support, Petitioner submits excerpts from its news coverage logs showing news and public affairs programming, including "29 Closeup" a public affairs program that airs twice weekly, which it argues are of interest to the residents of the communities. The station notes that only one commercial television station is licensed to Visalia---KMPH, a Fox network---which does not provide regularly-scheduled public affairs programming; that the only station licensed to Porterville---KKAK, an independent station---has no news or public affairs programming, nor is it carried on the Continental system serving Porterville; and that no stations are licensed to Tulare or Corcoran. Petitioner also asserts that companies have historically aired advertisements on

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[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[7] *Id.* at 2977 (emphasis in original).
[8] *Report and Order*, 8 FCC Rcd at 2977, 2977 n.139.
[9] 47 C.F.R. §76.59.
[10] *Report and Order*, 8 FCC Rcd at 2981.
[11] *See* Retlaw comments at 4. Retlaw notes that for the communities that are not listed in §76.53, the reference points are taken from *The National Gazetteer of the United States of America*, U.S. Geological Survey (1990).

the station targeting the residents of Tulare, Visalia, and Porterville. Finally, Burnham maintains that KBAK-TV has a long history of both cable and noncable viewing in the communities, noting its historical carriage on the cable systems and arguing that it has been significantly viewed in noncable households in both Tulare and Kings County for more than two decades.

10. In its comments on the petition, Pappas, licensee of station KMPH-TV, Visalia, California, states that it supports Burnham's request on the basis that the Fresno and Bakersfield "television markets substantially overlap as do the economic, political and societal activities of the communities of Bakersfield, Porterville, Visalia, Tulare, Corcoran and Fresno."[12] Pappas contends that it filed a similar request, which Burnham opposed, that Bakersfield be included in its ADI, and that in support it submitted information and documentation essentially identical to that presented by Burnham in the instant proceeding.

11. In its opposition, Continental requests that we deny Burnham's petition as it relates to Tulare, Visalia and Corcoran.[13] Continental begins by noting that both its Corcoran system and its Tulare/Visalia system are engineered for 42 cable channels and that neither system has any available channel capacity. Accordingly, it argues that it would have to drop satellite cable programming to make room for any new broadcast stations. This is apparently what happened when, on June 2, 1993, the Commission's must carry rules went into effect and Continental, required to add two stations from the Fresno ADI, dropped KBAK-TV and one other station from its systems serving Tulare, Visalia and Corcoran. Continental argues that it made the decision to drop these channels because the programming substantially duplicated the programming of the affiliates from the Fresno ADI.[14]

12. Continental further maintains that Burnham has failed to meet its evidentiary burden. First, Continental contends that although it has carried KBAK-TV on its Tulare/Visalia cable system, it has never carried the station on its Corcoran system. Second, Continental argues that the limited number of stories that KBAK-TV aired regarding the subject communities "seem[s] to indicate that the station orients itself significantly more toward coverage of news in Bakersfield . . . ," and that the "29 Closeup" program listed by Burnham is aired at odd hours and is not supported by a topics list showing the subject matter of the programs. In contrast, Continental asserts that the several major stations licensed to the Fresno ADI and Continental itself adequately cover the important issues and events of Tulare, Visalia, and Corcoran, and provide substantially more local programming than KBAK-TV. Regarding signal coverage, Continental asserts that not only does KBAK-TV not cast a Grade B signal over any portion of the Tulare/Visalia cable television system or over Corcoran, but that contrary to Burnham's arguments, KBAK-TV's signal quality is significantly lower than the Fresno stations and lower than any other Bakersfield station. Finally, Continental maintains that Burnham has failed to show sufficient viewership in Tulare, Visalia or Corcoran to justify expansion of the station's ADI. This is so, Continental argues, because with regard to Tulare and Visalia, Petitioner relies on its significantly viewed status which is a measure of viewership only in noncable households. With regard to Corcoran, Continental argues that KBAK-TV's viewership is so insubstantial that in some time slots it cannot even be calculated.[15] Continental asserts that KFSN-TV, the ABC affiliate in Fresno received a 12.2 rating and a 21 share in primetime in all television households during February 1993, while KBAK-TV received only a .7 rating and a 1 share in primetime in all television households during the same period.[16]

13. In addition to Continental, Retlaw, licensee of station KJEO-TV, Fresno, California opposed the petition on the grounds that it exceeds the scope of the applicable Commission rule and because the Fresno market stations currently provide the subject communities with sufficient local service. First, Retlaw argues that Burnham seeks to extend its ADI beyond its "natural service area," "extending into communities that are uniquely part of the Fresno market. . . ."[17] In addition, Retlaw contends that KBAK-TV fails to place a Grade B signal over Visalia, Tulare, or Corcoran, and that KBAK is a significant distance from the subject communities,[18] demonstrating that the communities are well within the Fresno ADI and not fringe communities to the Bakersfield market. In addition, Retlaw asserts that the petition fails to mention the significant local television service provided to the communities by the Fresno-Visalia ADI television stations. Retlaw notes that eight Fresno stations provide at least Grade B coverage to Visalia and Tulare, at least three Fresno stations provide Grade B coverage to Corcoran, and at least two Fresno stations provide Grade B coverage to Porterville.[19] Finally, Retlaw argues that Burnham's petition shows very little local coverage and that the list of programming lacks specificity.

14. In its consolidated response, Burnham reiterates and provides additional support for its arguments that it has met the statutory requirements for modification of its ADI, noting that not only has it been carried on the cable systems serving Tulare, Visalia and Porterville, but that it has also been carried on the cable systems serving many of the communities surrounding Corcoran.[20] In addition,

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[12] Pappas comments at 2.

[13] Continental states that it does not serve the community of Porterville, and therefore, is only opposed to Burnham's petition as it relates to these three communities.

[14] Continental argues that during the week of August 14-20, 1993, KBAK-TV's programming simultaneously duplicated that of KFSN-TV, the ABC affiliate from the Fresno ADI, for 73 of 132 hours, or 55.3 percent of the time. Continental opposition at 3, n.4.

[15] Continental states that Monday through Friday, 6:00 to 7:00 p.m., when its local news programming is running, KBAK-TV's viewership is so low it cannot be calculated. Continental opposition at 19.

[16] Continental opposition at 15-16, n.14, *citing* Nielsen Media Research, Total Activity Report, February 1993 for Fresno, CA.

[17] Retlaw opposition at 3.

[18] In contrast, Retlaw notes that Fresno, KJEO's community of license is located just 39.3 miles from Visalia, 44 miles from Tulare, 46.5 miles from Corcoran, and 48.8 miles from Porterville (approximately equidistant with Bakersfield). *See* paragraph 8, *supra*, for the distance between Bakersfield and the subject communities.

[19] *See Television and Cable Factbook, Stations Volume 61*, at A-110, A-116 to A-122 (1993).

[20] Burnham concedes that Continental has not carried KBAK-TV on its Corcoran system but argues, that because of its over-the-air coverage of Corcoran and the local service it has provided the community, must-carry status is appropriate.

Burnham asserts that contrary to the objectors' arguments, KBAK-TV has always been received over the air in the subject communities, and since at least 1972, has obtained significantly viewed status in the counties where these communities are located. Furthermore, regarding the frequency and nature of its local programming, Burnham argues that the evidence it submitted shows a greater emphasis on the communities of Porterville and Tulare than the news stories submitted by Continental regarding KFSN-TV,'s programming, and that unlike Continental, Burnham listed no stories originating with a wire service. Finally, Petitioner reasserts its contention that it enjoys significant viewership in Tulare and Kings County.[21]

DISCUSSION

15. Burnham has not provided sufficient evidence to justify its market modification request with respect to the communities of Tulare, Visalia, or Corcoran. However, Burnham has shown that the community of Porterville is logically part of its television market. Accordingly, its petition will be denied in part and granted in part.

16. With respect to the communities of Tulare, Visalia, and Corcoran, we find that Burnham has met only one of the four statutory factors specified in the 1992 Cable Act -- the historical carriage requirement, and only for Tulare and Visalia. In Corcoran, Burnham has failed to show that it meets any of the statutory factors. Burnham demonstrates that KBAK-TV has been carried on Continental and other cable systems serving Tulare and Visalia since as early as 1987. While this factor is entitled to considerable weight, it does not by itself and in the absence of satisfactory evidence satisfying the other factors, demonstrate that a change in its market boundary is warranted.

17. With respect to local coverage, the second statutory factor, we have stated that parties may demonstrate that the station places at least a Grade B coverage contour over the cable communities.[22] Although Burnham attempts to argue that its over-the-air signal is well received in Tulare, Visalia, and Corcoran, the communities actually lie outside of KBAK-TV's Grade B signal. In fact, it appears as if the stations's signal does not cover any portion of Kings County where Corcoran is located. However, failure to place a Grade B contour over the communities does not automatically warrant a denial of a station's ADI modification petition where the station can show geographic proximity and programming which serves the interests of the communities in question. We find that Burnham has also failed to show that KBAK-TV is any closer to the communities than the Fresno stations,[23] or that it provides programs of interest to the communities of Tulare, Visalia, or Corcoran. First, as stated *supra*, Bakersfield is significantly farther from the subject communities than is Fresno. In addition, the evidence submitted by KBAK-TV regarding its local programming is not sufficiently specific to determine whether it truly addresses issues of interest and concern to the residents of the communities.

18. While KBAK-TV presented little evidence regarding whether any other must-carry stations serve the communities, the record shows that in addition to other stations, KFSN, the ABC affiliate in the Fresno-Visalia ADI, and KMPH, the Fox affiliate from the ADI both serve the communities with local programming. We do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. However, the presence of other stations which serve the communities does not permit us to weigh this factor in favor of KBAK-TV's petition.

19. Finally, KBAK-TV's evidence relating to viewing patterns in the communities in question also does not suggest a close association with KBAK-TV or that the market structure should be revised. The most current survey information from Arbitron's 1993-94 *Television County Coverage: California* indicates that KBAK-TV is not widely viewed. In Tulare County, KBAK-TV earned a four share and a 34 net weekly circulation. In comparison, KFSN, the ABC affiliate in the Fresno-Visalia ADI, earned a 15 share and a 73 net weekly circulation. In Kings County, KBAK-TV's viewership is even lower -- earning a one share and a five net weekly circulation. This is in comparison to KFSN, the ABC affiliate from the Fresno-Visalia ADI, which earned a 15 share and 73 net weekly circulation in Tulare County and an 18 share and 82 net weekly circulation in Kings County. In addition, KBAK's viewership in both Tulare and Kings County is lower than all the network affiliates in the ADI. While the Commission has not adopted a minimum level of acceptable share or net weekly circulation for satisfying the fourth statutory factor, KBAK-TV's numbers, when compared with those of other stations in both Tulare and Kings Counties, do not show that its viewership in cable and non-cable homes in the two counties rises to a level which demonstrates that the communities therein form part of KBAK-TV's economic marketplace, especially given the findings herein that KBAK-TV has failed to show that the station meets the second and third statutory requirements for ADI modification. We find, therefore, that Burnham's failure to satisfy all but one of the statutory factors outweighs its showing of historical carriage and does not merit grant of its request with respect to Tulare, Visalia, or Corcoran.[24]

20. The factors as applied to Porterville are somewhat different. Burnham has shown that KBAK-TV has been carried on the Falcon cable system serving Porterville since as early as 1987. In addition, Porterville is within the station's Grade B signal contour. We note that Porterville is farther south from Fresno, and therefore, closer to KBAK-TV's city of license than the other three subject communities. Burnham's showing for Porterville with respect to the first and second factors, the evidence relating to the importance of KBAK-TV as an advertising medium for local business, and its geographic proximity to Bakers-

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[21] In addition, Burnham replies that the vehemence of the two parties opposing the petition, in light of the number of parties affected who did not oppose the petition, shows that the two parties are more interested in protecting their own economic interest than in promoting public service.

[22] *Report and Order*, 8 FCC Rcd at 2977.

[23] *See* paragraph 8 and footnote 19, *supra*.

[24] We note that under § 76.56(b)(5) of our Rules, Continental would not otherwise have been required to carry KBAK if, as claimed by Continental, Petitioner's programming substantially duplicates that of KFSN, the closer ABC affiliate.

field outweigh its low viewership in Tulare County, as noted in paragraph 19, *supra*, and warrants a grant of Burnham's petition with respect to the community of Porterville. Accordingly, for purposes of determining mandatory signal carriage obligations, we shall consider the community of Porterville, California to be part of KBAK-TV's ADI. This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, signal quality, channel capacity, and program duplication. *See* paragraph 7, *supra*.

ORDER

21. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed June 8, 1993 by Burnham Broadcasting Company, IS GRANTED to the extent indicated in paragraph 20, *supra*, and in all other respects IS DENIED. This change shall be effective in accordance with the following schedule: Burnham Broadcasting Company shall notify the cable systems in question in writing of its carriage and channel position election (§§76.56, 76.57, and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order*. The affected cable systems shall come into compliance with the applicable rules within 60 days of the above notice.

22. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Federal Broadcasting Company CSR-3889-A
Tuscaloosa, Alabama

For Modification of Station
WCFT-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1995; Released: June 26, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Federal Broadcasting Company ("WCFT-TV"), licensee of Station WCFT-TV (CBS, Channel 33), Tuscaloosa, Alabama, has filed the above-captioned petition requesting the Commission to modify WCFT-TV's Tuscaloosa, Alabama "area of dominant influence" ("ADI") for purposes of establishing must-carry rights in fourteen communities in eight western Alabama counties. These communities are: Eutaw in Greene County; Greensboro in Hale County; Aliceville, Reform, and Gordo in Pickens County; Fayette in Fayette County; York and Livingston in Sumter County; West Blocton and Centreville in Bibb County; Marion and Uniontown in Perry County; and Demopolis and Linden in Marengo County. CableSouth Inc. ("CableSouth"), operator of a cable television system serving communities in Hale County, filed "comments" in this matter stating that it did not object to WCFT-TV's request as long as the requested modification applies solely to WCFT-TV and that Hale County is not removed from the Birmingham ADI, to which Hale County is assigned. WCFT-TV filed a reply.[1]

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 |"1992 Cable Act"|[2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the 1992 Cable Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

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[1] CableSouth, Inc. also asserts that petitions of this type should be limited to situations in which the station intends to elect must-carry rights. CableSouth states that it is confused by WCFT-TV's request for market redesignation because the station has elected "retransmission consent" on the Tuscaloosa portion of the CableSouth system serving some of the communities of Hale County. If the communities in question are properly part of the market of the station, we find it to be no obstacle to the request that during the initial election period it has selected the retransmission consent option in a related area. One of the intended results of including a community within a market is to make that option available.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory signal carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Certain counties are divided into more than one sampling unit because of the topography involved. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. Refer to Arbitron's *Description of Methodology* handbook for a more complete description of how counties are allocated.

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

> where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.
>
> * * * *
>
> [This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided the following guidance in its *Report and Order in MM Docket 92-259, supra,* to aid decision making in these matters:

> For example, the historical carriage of the stations could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis, rather than a county-by-county basis, and that they should be treated as specific to particular stations, rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for an increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[11] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.,* when it has used up the channel capacity mandated for broadcast signal carriage, or determined which of duplicating stations are entitled to carriage priority.

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities at issue herein are located in eight counties in western Alabama located in three different ADIs. The communities in Greene, Hale, Pickens, Fayette, and Bibb Counties are all within the Birmingham, Alabama ADI. The communities in Perry and Marengo Counties are in the Montgomery-Selma, Alabama ADI, while the communities in Sumter County are all within the Meridian, Mississippi ADI. Many of the communities are located within the five counties that border on the Tuscaloosa ADI[12] and are within 20 to 30 miles from Tuscaloosa. The remaining communities are in nearby counties and are almost all within 50 miles of Tuscaloosa.

9. In support of its petition, WCFT-TV states that cable systems in the communities at issue have historically carried its signal. According to WCFT-TV, all of the cable systems that service the communities have carried its signal since at least 1987. In further support, WCFT-TV adds that its Grade A or B contours encompass the vast majority of the communities. The remaining communities, according to WCFT-TV, are served by the station because of their geographical links with Tuscaloosa. WCFT-TV states that many of the residents of these remote communities receive the station's programming only by subscribing to cable.

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[6] 47 U.S.C. §534(h)(1)(C)(ii).
[7] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[8] 8 FCC Rcd at 2977 (emphasis in original).
[9] *MM Docket 92-259,* 8 FCC Rcd at 2977 n.139.
[10] 47 C.F.R. §76.59.
[11] *MM Docket 92-259,* 8 FCC Rcd at 2981.
[12] The Tuscaloosa ADI consists of one county serving 56,600 households.

WCFT-TV maintains that if the cable systems fail to carry the station, residents of these communities may be prevented from viewing one of the only stations that addresses the news, events, and concerns of their communities.

10. WCFT-TV states that because of the geographic proximity and resulting commercial, political, and cultural ties between Tuscaloosa and the communities, the station provides coverage of emergencies, general, and feature news, as well as sports and weather of the communities on a daily basis. WCFT-TV's reports include stories of local interest to the communities such as local elections and area school programs and sporting events. WCFT-TV has also covered local events such as the Southern Christian Leadership Conference's rally, heritage home tours and the Eutaw Jazz Festival in Greene County; the annual Catfish Festival, a town meeting concerning Medicaid reductions, the Mound State Arts & Crafts Festival, and May Day activities in Hale County; ghosts in the Pickens County Courthouse, a Mule Day celebration, and checkers in the downtown Gordo Barber shop in Pickens County; the Frog-Day Festival, a murder trial, and the retirement of the Fayette Mayor in Fayette County; as well as layoffs, the resignation of the district attorney, and a fire in Bibb County. WCFT-TV has also featured news coverage of an interstate murder trial in Livingston and the Livingston University homecoming in Sumter County; the Alabama Women's Hall of Fame at Judson College and the state high school basketball champion's celebration in Perry County; and the Christmas on the River Parade and festival and Demopolis High School's first integrated prom in Marengo County.

11. WCFT-TV also states that in addition to extensive local coverage during its news programs, it also broadcasts specials of particular interest to residents of the communities. For instance, WCFT-TV airs a public affairs program entitled "News & Views" at noon every day to discuss issues and events of interest to viewers in its service area. WCFT-TV states that these programs frequently feature guests from the various communities. The station has also coupled its local coverage with non-broadcast service to the communities. For instance, it co-sponsored the annual Catfish Festival in Greensboro, Hale County, promoting the event without charge and donating news anchors to serve as masters of ceremonies. WCFT-TV states that many other anchors have participated in community events as masters of ceremonies or as judges for local beauty pageants. WCFT-TV also participates in projects such as the "DARE" program which honors children for remaining free of drugs.

12. WCFT-TV also states that stations in the communities' ADIs fail to provide significant service to the communities. WCFT-TV maintains that it is the only television station which focuses significant attention on these communities. WCFT-TV asserts that because the Birmingham ADI is much larger that the Tuscaloosa ADI, in terms of both area and population, the television stations in Birmingham don't devote the time that WCFT-TV devotes to Pickens, Greene, Hale, Bibb, and Fayette Counties. Similarly, WCFT-TV states that the size and population of the Montgomery-Selma ADI, and the distance of these communities from Montgomery, inhibits these stations from concentrating upon Perry and Marengo counties. Also, according to WCFT-TV, Mississippi television stations have little incentive to air news about Alabama because Sumter County is one of only two Alabama counties within the Meridian, Mississippi ADI, both of which are sparsely populated.

13. In addition, according to WCFT-TV, because community leaders have recognized efforts to serve them, the mayors of nine communities have submitted letters urging the Commission to extend WCFT-TV's must-carry rights to the cable systems in their communities.[13] These letters attest to the fact that WCFT-TV has provided consistent coverage of news, high school sports and festivals in their communities. Indeed, some of the mayors state that WCFT-TV is the only station in the area which covers local events in their communities.[14]

14. Moreover, WCFT-TV also states that local viewing pattern data demonstrate the popularity of WCFT-TV in the communities. WCFT-TV states that informal measurements indicate a high level of interest in its programming throughout the communities, and also submits Nielsen Media Research's 1993 County/Coverage Study summaries for all of the counties in which the communities are located. Thus, with regard to evidence of viewing patterns in cable and noncable households in the Birmingham ADI counties, for instance, WCFT-TV received a total average share of 3 during the Sun.-Sat. 7:00 A.M. - 1:00 A.M. time period in Bibb County. When comparing its share to the six other local Birmingham stations, WCFT-TV comes in fourth overall. In Fayette County, WCFT-TV garnered a 7 share and came in fourth overall in comparison to the six local Birmingham stations received in the county. In Greene County, in comparison to the three local stations received, WCFT-TV received a 12 share and came in second overall. In Hale County, WCFT-TV received a 19 share and tied for second place when measured against the five local Birmingham stations. In Pickens County, WCFT-TV received a 6 share and came in fourth when compared to the five local Birmingham stations. However, in the Montgomery-Selma ADI, in Marengo County, WCFT-TV received a 1 share and tied for second to last place in comparison to six other local Montgomery stations. In Perry County, WCFT-TV received a 1 share and came in fifth in comparison to five local stations. In the Meridian, Mississippi ADI, in Sumter County, WCFT-TV received a 6 share and came in third in comparison to three local stations.

15. With regard to its own informal measurements, WCFT-TV asserts that because of the outstanding local service it provides to the communities and the lack of attention they receive from television stations in other ADIs, a significant number of residents of the communities regularly watch WCFT-TV. As further evidence of the communities' viewing patterns, WCFT-TV points to the letters

[13] Letters from mayors from 7 of the communities here in question include: Reform and Gordo in Pickens County; Greensboro in Hale County; Fayette in Fayette County; Eutaw in Greene County; Demopolis in Marengo County; and Centreville in Bibb County. Letters from the mayors of 2 other communities, Vernon in Lamar County and Carrollton in Pickens County, were also included, although neither of these communities were among those included in this ADI request.

[14] The letter from the Mayor of Greensboro states that WCFT-TV does a better job of covering local news for the community than any other station in the viewing area. Similarly, the Mayor of Centreville states that WCFT-TV is the only channel in the area that covers its local social or sporting events.

written by the mayors of communities who wrote to express their communities' reliance upon WCFT-TV. The station also states that it receives an extensive amount of mail and inquiries from residents of these communities. In addition, WCFT-TV reports that the residents regularly contact the station to offer news and sports information from their communities.

ANALYSIS AND DECISION

16. WCFT-TV has demonstrated in its petition that the majority of the communities located in the western Alabama counties in question are logically part of its ADI market under the factors specified in the 1992 Cable Act and its petition will accordingly be granted in part and denied in part. Although WCFT-TV's submitted data regarding historical carriage does not indicate how long WCFT-TV has been carried on the cable systems in the communities, we will accept WCFT-TV's affidavit of its Vice President and General Manager, W. Tommy Ray, regarding the truth and veracity of statements made in its petition. However, we note that the March 1993 data submitted by WCFT-TV from the Nielsen Cable On-line Data Exchange does not indicate that either Livingston in Sumter County or Reform in Pickens County was carried at that time. Review of available Commission resources, however, indicates that the station has been historically carried in these two communities since at least 1984 and, as such, the communities will be given credit for this statutory factor.

17. In addition, WCFT-TV has adequately demonstrated that most of the communities are serviced by either its Grade A or Grade B contour and that it provides programming and other local service to most of those communities. We have no evidence before us, however, that Uniontown in Perry County is within WCFT-TV's predicted Grade B contour or receives any local coverage from the station. In addition, Uniontown is not in close proximity to WCFT-TV's city of license because it is located approximately 65 miles away. Marion in Perry County is on the border of the station's predicted Grade B contour, and does receive some local coverage from the station. Moreover, from the information before us, while neither York nor Livingston in Sumter County is within the station's Grade B contour, it appears that both communities also receive some local coverage from the station. Demopolis and Linden in Marengo County are also not encompassed within the Grade B contour, but both receive some local coverage and we are also in receipt of a letter from the Mayor of Demopolis attesting to the value of that coverage.

18. With regard to the third factor, we are generally persuaded by WCFT-TV's representations that despite other television stations being eligible for carriage by cable systems in the community, WCFT-TV focuses significant attention on the communities. We are persuaded that the size, population, or distance of the communities in question in relation to their respective ADIs may serve to prevent these stations from providing complete coverage of local events, news, or sports to some of these communities. Letters from the mayors of Reform, Greensboro, Gordo, Fayette, Eutaw, Demopolis, and Centreville further bolster this argument.

19. We are also persuaded by the available evidence submitted by WCFT-TV that the cable and noncable household viewing patterns for the communities of West Blocton and Centreville located in Bibb County; Fayette in Fayette County; Eutaw in Greene County; Aliceville, Reform, and Gordo in Pickens County; and Greensboro in Hale County indicate fairly adequate widespread viewership of WCFT-TV. While WCFT-TV does receive some viewership in the communities of Demopolis and Linden in Marengo County; Marion and Uniontown in Perry County; and York and Livingston in Sumter County, the viewing pattern statistics are somewhat lower than those of the above-referenced communities.

20. Considering the totality of the facts and circumstances in this case, we are convinced that WCFT-TV has sufficiently justified its request to add the named communities to the Tuscaloosa, Alabama ADI,[15] with the exception of Uniontown in Perry County and Demopolis and Linden in Marengo County. We take exception with the addition of Uniontown to WCFT-TV's television market because this community is not covered by the station's Grade B contour and is not located in close proximity to the station's city of license. In addition, we have no evidence before us to indicate that the station provides local coverage to the community. We are also not convinced that the station receives significant viewership in the community, achieving only a 1 share as compared with that of Television Broadcast Station WAKA (CBS, Channel 8), the Selma ADI CBS affiliate, which achieves a 42 share. With regard to Demopolis and Linden, we do not believe that there is widespread viewership of WCFT-TV in those communities, the station achieving only a 1 share as compared with WAKA's 36 share. We recognize that while each of the relevant factors do not apply equally to each of the other communities to be included, we are satisfied that, on balance, each of the communities substantially complies with a majority of the enumerated factors.

ORDER

21. In view of the foregoing, we find that grant of WCFT-TV's petition to the extent indicated above, is in the public interest.

22. Accordingly, IT IS ORDERED, pursuant to §614(h)(1)(C) of the Communications Act of 1934, as amended (47 U.S.C. §534(h)(1)(C)), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the petition for special relief (CSR-3889-A) filed June 8, 1993 by Federal Broadcasting Company IS GRANTED to the extent indicated in paragraph 20, *supra*, and in all other respects IS DENIED.

23. IT IS FURTHER ORDERED, That this change shall be effective in accordance with the following schedule: WCFT-TV shall notify the cable systems in question in writing of its carriage and channel position elections (§§76.56, 76.57 and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum*

[15] We note that in conjunction with CableSouth, Inc.'s comments in this matter, the requested modification applies solely to WCFT-TV, and Hale County will not be removed from the Birmingham ADI.

Opinion and Order. The cable systems shall come into compliance with the applicable rules within 45 days of the above notice.

24. These actions are taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Smith Television of New York, Inc.
Elmira, New York — CSR-3887-A

For Modification of
WETM-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1995; Released: June 26, 1995

By the Cable Services Bureau:

INTRODUCTION

1. In the captioned proceeding, Smith Television of Elmira, New York, Inc. ("WETM"), licensee of WETM-TV (NBC, Channel 18), Elmira, New York, has requested the Commission to include all of the communities in Schuyler County, New York and Bradford County, Pennsylvania ("the Communities")[1] within the Elmira, New York "area of dominant influence" ("ADI") for purposes of the cable television broadcast mandatory signal carriage rules. Stainless Broadcasting, Inc., licensee of WICZ-TV (NBC, Channel 40), Binghamton, New York, and Gateway Communications, Inc., licensee of WBNG-TV (CBS, Channel 12), Binghamton, New York (collectively referred to as the "Binghamton Stations") filed a joint opposition to WETM's petition, opposing inclusion of Bradford County in WETM's ADI.[2] WETM filed a reply to the joint opposition.[3]

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][4] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[5] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[6] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive apreponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[7]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -

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[1] These Communities include: Alpine, Altay, Beaver Dams, Bennettsburg, Burdett, Catharine, Cayuta, Hector, Mecklenburg, Monterey, Montour Falls, Moreland, Odessa, Reading Center, Reynoldsville, Tyrone, Valois, Watkins Glen, Wayne, and Westen in Schuyler County, New York; the communities known as "the Valley" in Bradford County Pennsylvania: Athens, Sayre, and South Waverly; and Alba, Allis Hollow, Austinville, Bentley Creek, Big Pond, Bourne, Burlington, Camptown, Canton, Columbia Cross Roads, Durrell, East Athens, East Canton, East Smithfield, East Towanda, East Troy, Evergreen, Fassett, Franklindale, Ghent, Gillett, Granville Summit, Granville Center, Herrillville, Hollenback, Leona, Leroy, Liberty Corners, Litchfield, Luther Mills, Lime Hill, Merryall, Meyersburg, Monroeton, Mosherville, New Albany, North Rome, North Orwell, North Towanda, New Era, Orwell, Overton, Pottersville, Powell, Raysville, Reading Center, Ridgebury, Rummerfield, Rome, Sheshequin, Silvarda, Sylvania, Springfield, Snedekerville, Standing Stone, Stevensville, South Towanda, Sugar Run, Terrytown, Troy, Towanda, Ulster, Vroman Hill, Viall Hill, Warren Center, and West Burlington in the remainder of Bradford County, Pennsylvania.

[2] The Binghamton Stations state that although WETM's Petition seeks to include both Schuyler County, New York and Bradford County, Pennsylvania, they only oppose the Petition as it relates to Bradford County.

[3] Other documents filed in this case include a Supplemental Certificate of Service indicating service to six additional parties of Smith Television of New York, Inc.'s Petition for Special Relief, filed by WETM on July 7, 1993; a Supplement to Joint Opposition to Special Relief filed by the Binghamton Stations on August 18, 1993; and a Supplement to the Petition field by WETM on August 27, 1993.

[4] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[5] 8 FCC Rcd 2965, 2976-2977 (1993).

[6] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission"s Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[7] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

(II) whether the television station provides coverage or other local service to such community;

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[8]

4. The legislative history of this provision indicates that:

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[9]

5. The Commission provided guidance in its *Report and Order* to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[10]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[11] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[12]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[13] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.*, when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities in question are in Schuyler County, New York and Bradford County, Pennsylvania. Schuyler County is located within the Syracuse, New York ADI, and Bradford County is located within the Binghamton, New York ADI. WETM is located in Elmira, New York, in the Elmira ADI. Elmira is in Chemung County, the easternmost county of the three-county ADI. The communities in question border the county of Chemung to the north and south.

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[8] 47 U.S.C. §534(h)(1)(C)(ii).
[9] H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).
[10] *Id.* at 2977 (emphasis in original).
[11] 8 FCC Rcd at 2977 n.139.
[12] 47 C.F.R. §76.59.
[13] 8 FCC Rcd at 2981.

9. In support of its petition, WETM contends that the local cable systems serving the Communities have historically carried its signal. On May 10, 1995, WETM supplemented its petition with a list of the communities in which it has historically been carried, and the dates of carriage in those communities. In its supplemental filing, petitioner states that WETM has been carried on cable systems serving the communities in Schuyler County since as early as 1985, and that in Bradford County it has been carried on 15 systems since at least 1985 and on other systems since the communities first appeared in the *Television and Cable Factbook*. WETM notes, however, that certain communities listed in its Petition do not appear in the *Television & Cable Factbook* because they are either unincorporated areas or the communities currently lack cable service. In addition, WETM admits that in Bradford County it is not carried on the Beaver Valley Cable Co. system serving Rome, Ulster, and Warren Center, Pennsylvania.[14] Regarding its compliance with the second statutory requirement, local coverage, WETM notes that its Grade A contour covers all but one community in Schuyler County and at least a Grade B contour covers the remaining community in Schuyler County and "all but one or two" of the communities of Bradford County.[15] In addition, WETM contends that because of the geographic proximity of the Communities to Elmira, WETM has provided extensive coverage of emergencies, news and events in the Communities.[16] WETM also notes that it provides advertising services to the business owners of the Communities and that consumers would be deprived of important information regarding these businesses if the residents of the Communities ceased to receive WETM's signal on their cable systems. Furthermore, WETM asserts that it is the only television station in the area that focuses significant attention on the daily events of the Communities. Finally, with respect to the evidence of viewing patterns, WETM claims that it received a 15 percent sign-on to sign-off share of the viewing in Schuyler County Communities in 1992 and that the share rose to 40 and 47 percent, respectively, during WETM's 6:00 p.m. and 11:00 p.m. news programs, based on 1992 Nielsen Media Research data. In Bradford County, WETM claims that it received an eight percent station share of the sign-on to sign-off viewing in 1992, and a higher rating than any other NBC affiliate.

10. The Binghamton Stations oppose WETM's petition only as it concerns the communities in Bradford County, Pennsylvania. The petition, therefore, is unopposed regarding the inclusion of the communities in Schuyler County, New York as part of WETM's ADI. The Binghamton stations argue in their opposition that WETM's petition fails to demonstrate the necessary community-specific support for market change. The stations argue that the Commission does not have the authority to modify an ADI on a county-wide basis. In addition, the Binghamton Stations note that WETM admits in its petition that its signal contours do not cover all of Bradford County. The stations also claim that WETM's local programming does not cover all of the communities of Bradford County, but that the programming focuses on the communities known as the Valley (Sayre, Athens, and Waverly).[17] The Binghamton Stations list their coverage of Bradford County events, noting that the programming contradicts WETM's claims that Binghamton stations do not report on Bradford County news. Furthermore, the Binghamton Stations assert that WETM's viewing statistics are incomplete and provide no basis for comparison. Instead, the stations claim that the Bradford County coverage data from Nielsen and Arbitron show that Binghamton stations have an ADI total share of 33%, compared to Elmira stations' combined 15% share. Regarding historical carriage, the Binghamton Stations contend that not only does WETM fail to provide evidence regarding historical carriage, but that other stations such as WICZ and WBNG can also claim historic carriage on Bradford County cable systems. Finally, the Binghamton Stations argue that the information provided by WETM regarding advertisers in Bradford County is irrelevant to WETM's request because must-carry rights are designated to facilitate viewers' access to local programming, not to expand the audience for stations' advertising.

11. In its reply to the opposition, WETM maintains that contrary to the arguments propounded by the Binghamton Stations, WETM has shown that current marketplace conditions in the Communities support a modification of its ADI as requested. WETM replies that it has met the historical carriage requirement because all but one of the cable systems with headends in the Communities have carried WETM's signal for years. WETM states that the cable system that has not historically carried WETM's signal, Beaver Valley Cable Co., serves only 3.6% of the cable subscribers in the Communities. In addition, WETM reinforces its contention that it provides significant coverage of local news stories regarding all of the communities in Bradford County, explaining that because a majority of cable subscribers in Bradford County (73%) reside in the Valley and Towanda, these communities naturally comprise a greater portion of the news coming from the County.[18] WETM notes that its petition also shows that it covers news and events throughout the remainder of Bradford County, and that it provides extensive coverage of news and events regarding Elmira, New York, which is one of the few large cities in the vicinity. Furthermore, WETM argues that the Binghamton Stations are incorrect in their conclusion that WETM does not provide a sufficient signal to many of the communities in Bradford County. WETM maintains that it delivers a Grade B signal to all of the cable headends in Bradford County, and "that its Grade B

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[14] WETM also notes that it is not carried on the cable system serving Mecklenburg, New York, nor on the systems serving Camptown and New Albany, Pennsylvania, but that the systems serving these communities all have headends located outside of the respective counties.

[15] WETM does not state which communities are not covered by at least a Grade B contour, other than noting the villages in the southeastern-most portion of Bradford County, but Petitioner does provide a map of its contours as Exhibit 2 to its Petition which shows that the contour covers all but a very small sliver of the county. *See* paragraph 14, *infra*.

[16] *See* Petition, Exhibit 4.

[17] The stations point to the title of WETM's Exhibit 4 -- "NEWS COVERAGE PROVIDED BY WETM FOR BRADFORD COUNTY: (*The Valley - Sayre-Athens-Waverly)*" -- arguing that the title "belies WETM-TV's claims to county-wide program service."

[18] WETM notes that its coverage of the communities of the Valley is so extensive that it warrants inclusion of these communities in WETM's ADI, even if we deny the petition with respect to the remaining Bradford County communities.

signal covers all of the Communities in Bradford County except a few villages in the southeastern-most corner of the county . . . ."[19] WETM also argues that Binghamton Stations do not provide such significant local coverage as to warrant denial of its Petition. It contends that WETM was the only station to provide extensive coverage regarding certain news stories of local interest, and that the Binghamton stations do not cite to examples of local coverage by WBNG. Finally, WETM maintains that Nielsen viewing data from 1992 and1993 shows that Bradford County residents "rely heavily" on WETM for local news. As support for this argument, WETM provides the following statistics from 1993 Nielsen County Coverage data, comparing viewership for WETM and the Binghamton Stations in Bradford County:

Household Share

	Sign-On to Sign-Off	M-F 6pm News	M-F 11pm News
WBNG/ Binghamton (CBS)	22	22	25
WETM/ Elmira (NBC)	10	12	18
WICZ/ Binghamton (NBC)	3	2	2

ANALYSIS AND DECISION

12. Petitioner has made a persuasive case that the communities in question are logically part of WETM's market for purposes of the cable television mandatory broadcast signal carriage rules under the standards set forth in §614(h) of the Communications Act. Accordingly its petition will be granted. We note that each of the applicable standards does not apply equally to all of the Communities. However, considering the totality of the evidence presented by WETM, we believe that the communities of Schuyler County, New York and Bradford County, Pennsylvania that are the subject of this petition should be considered part of WETM's ADI. WETM has presented evidence that its request meets three of the four statutory guidelines for determining whether a request for ADI modification should be granted.

13. First, WETM shows that local cable systems in Schuyler County and Bradford County have historically carried WETM's signal. In addition, WETM's pleadings and the 1994 *Television and Cable Factbook* show that WETM is currently carried on most of the cable systems in the Communities. Although WETM has not been carried on every cable system in the Communities, we find that this does not weigh against a grant of WETM's petition when we consider WETM's demonstration of service to the Communities, as discussed *infra*, combined with the fact that a majority of the cable systems serving the Communities has continuously carried WETM.

14. Furthermore, WETM has shown that it provides coverage or other local service to the Communities. WETM shows that its Grade A contour covers all but one of the communities in Schuyler County, and that its Grade B contour encompasses the remaining Schuyler County community and the overwhelming majority of the communities in Bradford County. The fact that WETM places a Grade A or Grade B signal over almost all of the Communities is persuasive evidence that WETM provides service to the Communities. While we recognize that the station may not cover certain communities in the southeastern-most tip of Bradford county with a predicted Grade B signal, we believe that because other factors weigh heavily in favor of granting WETM's market modification request, and because the contour map provided by WETM appears to show that if any communities are outside of the station's Grade B contour, they are few in number and lie just on the edge of the contour.[20] Moreover, WETM's showing of local service is augmented by its coverage of news events relating to the Communities in both counties. WETM lists a number of news, sports, and weather stories regarding the Communities and also shows that it participates in certain community events. The Binghamton Stations, however, attempt to rebut WETM's showing of localism by arguing that WETM provides no public affairs programming and limited local news for the Bradford County communities. We reject the contention of the Binghamton stations. We find that WETM satisfies this criteria in the Communities due to the coverage of its service contours, its "local programming, and its close proximity to the Communities."[21] In addition, we believe that the fact that local businesses in Bradford County use WETM as an advertising medium further supports a grant of the petition. We do not agree with the Binghamton Stations that in determining whether specific communities should be included in a "market" advertiser support is not relevant.

15. Regarding the third consideration of whether any other station qualified for carriage provides coverage of news or programming of local interest, although WETM states that Syracuse stations -- the ADI to which Schuyler County belongs -- do not provide the local coverage which WETM does, the record does not include any evidence regarding the programming of the Syracuse stations. In addition, the Binghamton Stations challenge WETM's petition under the third criterion, arguing that they provide more and better news and programming coverage of interest to the communities in Bradford County. We believe that Congress did not intend the third criterion to be a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. Under such circumstances, a denial of carriage rights to the claiming station could deprive cable viewers of any broadcast signals that might provide programming geared to their communities. Because WETM, along with other stations, appears to serve the Communities, this enhancement factor would not appear applicable.

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[19] Reply to Opposition at 6, n.14.

[20] Petition, Exhibit 2.

[21] Based on our records, we estimate that Binghamton is almost twice the distance from the Valley, one of the most heavily populated areas of Bradford county, as is Elmira.

16. Finally, we find that WETM has presented evidence of viewing patterns for cable and noncable households sufficient to demonstrate significant viewership of WETM in Schuyler County and Bradford County. In fact, with regard to Schuyler County, WETM states, Nielsen has assigned the county to the Elmira Designated Market Area ("DMA"), Nielsen's equivalent of the Arbitron ADI. A review of the 1993-1994 Arbitron data confirms that in Schuyler County, WETM received a 15 share, higher than any other station in the ADI, and a 42 net weekly circulation. Regarding the communities in Bradford County, Pennsylvania, although WBNG, one of the opposing Binghamton stations, received higher total viewership than WETM, according to Arbitron 1993-1994 data, WETM received the second highest total viewership of any station in Bradford County and almost twice the share of WICZ, the NBC affiliate assigned to the Binghamton ADI. In addition, WETM received a total net weekly circulation of 44 compared to WICZ's net weekly circulation of 27. WETM's viewership during its broadcast of local news is also significantly higher than that of WICZ during the same time periods. We acknowledge the Binghamton Stations' argument that both Nielsen and Arbitron data are county-wide rather than community-specific, however, because WETM seeks to include all the Communities in both counties and has established a record on this basis, absent evidence that such data are not fairly reflective of viewing in the actual communities in question, we shall accept such data as probative.

17. We believe, based on a totality of the circumstances, that WETM has provided evidence to justify its market modification request to include the Communities in Schuyler County, New York, and Bradford County, Pennsylvania within its ADI. We find that WETM has sufficiently met three of the four statutory factors specified in the 1992 Cable Act. Even absent the enhancement under the third criterion, the record before us warrants grant of its request.

18. Accordingly, for the purposes of determining mandatory signal carriage obligations, we shall consider the Communities in Schuyler County, New York and Bradford County, Pennsylvania,[22] to be part of the Elmira, New York ADI with respect to WETM.[23] This determination is subject to all generally applicable limitations on signal carriage rights, including copyright liability, signal quality, channel capacity, and program duplication. *See* paragraph 7, *supra*.

ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed June 1, 1993 by WETM-TV, Inc. IS GRANTED.

20. IT IS FURTHER ORDERED, That this change shall be effective in accordance with the following schedule: WETM-TV shall notify the cable systems in question in writing of its carriage and channel position elections (§§76.56, 76.57 and 76.64(f) of the Commission's Rules) within 30 days of the release date of this *Memorandum Opinion and Order*. The cable systems shall come into compliance with the applicable rules within 45 days of the above notice.

21. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[22] *See* footnote 1, *supra*.

[23] The Schuyler County and Bradford County Communities also remain within the Syracuse, New York ADI and the Binghamton, New York ADI, respectively.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

MOUNTAIN BROADCASTING CORPORATION — CSR-4225-M
Newton, New Jersey

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1995; Released: June 26, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Mountain Broadcasting Corporation ("Mountain"), licensee of WMBC-TV (Ind., Channel 63), Newton, New Jersey, filed a complaint claiming that Suburban Cablevision ("Suburban"), operator of cable television systems serving communities in Essex, Hudson, Middlesex, and Union Counties in northeastern New Jersey, had declined to carry the station, even though the station is a qualified local commercial television station within the meaning of §76.55(b) of the Commission's Rules and §614(b) and (h)(1) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] Suburban filed an opposition to the complaint to which Mountain filed a reply.

2. In order to resolve the issues relating to signal quality, on March 9, 1995, we requested that the parties provide a new set of signal quality measurements from jointly performed tests.[2] On April 28, 1995, Suburban provided an engineering report conducted by an outside expert which allegedly shows that at the Verona headend WMBC-TV's signal quality is inadequate. On May 12, 1995, Mountain submitted an engineering report with tests conducted by an outside consulting engineer and witnessed by representatives of both Mountain and Suburban. The report allegedly confirms that WMBC-TV places a good quality signal over the Verona headend.

SUMMARY OF PLEADINGS

3. In support of its request, Mountain states that on April 12, 1993, it notified Suburban that it was electing "must carry" status for its signal on the Suburban system. By letter dated April 29, 1993, Suburban notified Mountain that it believed signal strength and distant copyright liability concerns might affect WMBC-TV's signal carriage rights.[3] In addition, Mountain claims that even if, contrary to its arguments, Suburban's designation of the Verona facility as its principal headend was acceptable under the Commission's rules, WMBC-TV delivers a good quality signal to that headend.[4] Furthermore, Mountain contends that the antenna used by its engineers during its November 16, 1993 tests, which measured a signal of -43.75 dBm, is "much more accurate, precise, and professional than the consumer Radio Shack/TANDY model utilized by Suburban."[5] Mountain notes that it offered to supply Suburban the necessary antenna and cable at its own expense to resolve the reception problems at Verona. Regarding the issue of indemnity for copyright liability, Mountain contends that it has requested carriage in only those communities located within the station's thirty-five mile zone, reserving its carriage rights with respect to other communities served by Suburban should their copyright status change.[6]

4. In its opposition, Suburban contends that WMBC-TV has failed to satisfy the Commission's must carry requirements. Specifically, Suburban maintains that the station does not provide adequate signal quality to the cable system's Verona headend, nor has Mountain agreed to indemnify Suburban for all the copyright liability costs which would result from carriage of WMBC-TV. In support, Suburban argues that, contrary to Mountain's contentions, its designation of the Verona facility as its principal headend "meets each of the FCC's tests for such a designation and was selected without regard to must carry implications."[7]

5. In its reply to Suburban's opposition, Mountain reiterates its claim that WMBC-TV delivers a signal of adequate strength to entitle it to mandatory carriage at the Verona headend, and that WMBC-TV is a "local" signal for copyright purposes in communities where a majority of Suburban's subscribers reside. Mountain reasserts that the tests conducted by Suburban on November 22, 1993 employed only a consumer-grade TANDY antenna and did not meet the measurement guidelines set by the FCC.[8] Mountain argues that because its tests employing such FCC-required techniques demonstrated that WMBC-TV delivers an adequate signal at the Verona headend, the burden is now on Suburban to show that "using appropriate equipment and methodology, WMBC-TV's signal does not meet the requisite statutory thresholds.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] As discussed herein, while Suburban admitted that it does not dispute the engineering tests taken by Mountain on November 16, 1993 to measure signal quality, it also argued that it believes that WMBC-TV's tests reach a "barely passable" reading only during the winter months because there is little foliage. Because the parties generally submitted conflicting evidence regarding the results of their signal quality tests, we believed that additional tests were necessary to make an accurate finding on this issue.

[3] Suburban stated that its tests showed that WMBC-TV delivered a signal strength of -58 dBm at its principal headend in Verona, New Jersey and that annual copyright liability for carriage of WMBC-TV on Suburban's system would be $511,100.

[4] In its complaint, Mountain took issue with Suburban's designation of Verona as its principle headend. Mountain argued, based on statements made by Suburban management, that this designation was not in good faith. *But see* footnote 14, *infra*.

[5] Complaint at 7-8.

[6] *See* paragraph 8, *infra*.

[7] Opposition at 3. *See Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 2968 (1993).

[8] *Citing Independence Public Media of Philadelphia, Inc.*, DA 93-1408 (Sept. 1, 1993); *See also Clarification Order*, 8 FCC Rcd 4143-44.

6. In its April 28, 1995 supplemental filing, Suburban argues that the signal quality tests conducted on April 24, 1995 by an outside expert confirmed that WMBC-TV's signal quality is inadequate at the Verona headend. The engineering report states that two tests were conducted, one using a Radio Shack antenna, model U-120, the other using a Sitco MU48-4 antenna. Suburban recorded signal levels between -74 dBm and -58.5 dBm. It appears from the engineering report that Suburban conducted these tests independently, without the presence of a representative from Mountain.

7. Mountain's supplemental signal quality tests, conducted on May 8, 1995 with a representative of Suburban present, concluded that WMBC-TV's signal quality was sufficient to meet our requirements. Specifically, using a Sitco MU48-4 antenna, the report shows that at one location on the building, WMBC-TV's signal level was measured to be -44.35 dBm at 15 feet above the rooftop and -45.05 dBm at 30 feet above the rooftop. At the second location suggested by Suburban, WMBC-TV's signal was measured to be -42.05 dBm and -41.35 dBm.[9]

DISCUSSION

8. Under the provisions of the 1992 Cable Act, as well as the Commission's Rules, a cable system need not afford must-carry status to an otherwise qualified local commercial television station if (1) the station would be considered a distant signal, and therefore, its carriage would subject a cable operator to increased copyright liability, unless the station has agreed to indemnify the cable operator, or if (2) the station fails to provide a good quality signal to the system's principle headend.[10] The issue raised by the petitioner regarding WMBC-TV's copyright license liability has been resolved with the passage of the Satellite Home Viewer Act of 1994,[11] which amended Section 111(f) of title 17, United States Code.[12] Under this Act, a station located within the same ADI as a cable system is no longer considered a "distant signal" on that system for purposes of compulsory copyright license liability and, therefore, is not subject to the additional copyright fees attendant to "distant signal" carriage within the market.[13] Applying the Act to the facts of this proceeding, WMBC-TV is not considered a "distant signal" if carried on cable systems located in the New York ADI and, therefore, would not face additional copyright fees if carried on Suburban's system.

9. The remaining issue involves Suburban's assertion that WMBC-TV provides a poor quality signal at Suburban's Verona headend.[14] Section 534(h)(1)(b)(iii) of the 1992 Cable Act set out the requisite signal levels for VHF and UHF commercial stations at a cable system's headend. For UHF commercial stations, such as WMBC-TV, the standard is -45 dBm. In applying the above standard, we have determined that good engineering practices require that for UHF stations such as WMBC-TV, if the initial test results show a signal level of less than -51 dBm, then at least four readings must be taken over a two hour period. If the initial readings show a signal between -51 dBm and -45 dBm, inclusive, then six readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[15] This is the best evidence of the availability of a station at a subject system headend. At a minimum, signal strength surveys should include the following information, in addition to that noted above: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done.

10. Mountain's signal quality tests, the only tests conducted with a representative of the other party present, as required by our March 9, 1995 letter, showed WMBC-TV's signal strength at the Verona headend to be sufficient to meet our requirements. Suburban has raised no substantive objections to the results of the joint tests conducted on May 8, 1995. We believe that the joint tests are the best indicator of whether a good quality signal is present at a particular headend, therefore, we will rely on the results of Mountain's signal quality tests as submitted in its May 12, 1995 supplemental filing.

ORDER

11. Accordingly, the petition filed on February 18, 1994 by Mountain Broadcasting Corporation, IS GRANTED in accordance with Section 615(j)(3) (47 U.S.C. § 535) of the Communications Act of 1934, as amended. Suburban Cablevision IS ORDERED to commence carriage of WMBC-TV sixty (60) days from the date that Mountain provides the necessary specialized equipment to receive a good quality signal at Suburban's Verona headend.

12. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[9] According to the engineering report, the signal levels were measured to be +4.4 dBmV and +3.7 dBmV at the first testing site, and +6.7 dBmV and +7.4 dBmV at the second testing site. A review by our engineering staff indicates that the engineering report incorrectly calculated the dBm equivalent for these measurements. *See* Mountain Supplement at 6-8. The dBm equivalents stated above reflect accurate calculations, however, these corrections do not materially affect the findings herein.

[10] 1992 Cable Act, § 534 (h)(1)(B)(ii) and (iii).

[11] Satellite Home Viewer Act of 1994, P.L. 103-369, 108 Stat. 3477 (1994).

[12] 17 U.S.C. §111(f). Mountain filed its complaint on February 18, 1994, prior to the passage of the Satellite Home Viewer Act which was signed into law on October 18, 1994.

[13] 108 Stat. 3481.

[14] While Mountain has not conceded that Suburban's designation of Verona as its principal headend is not subject to challenge, as stated *supra*, it has agreed to provide the necessary equipment for WMBC-TV to deliver a good quality signal to that headend. We find, therefore, that it is not necessary to consider this issue at the present time.

[15] *See Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable*, 8 FCC Rcd 4953 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Douglas Cable Communications II	CSR-3957-M MO0862

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1995; Released: June 26, 1995

By the Cable Services Bureau:

1. Pending in the captioned proceeding is a petition for reconsideration was filed on behalf of Douglas Cable Communications II ("Douglas"), operator of a cable system serving Malta Bend, Missouri.[1] Douglas requests that the Commission reconsider its decision[2] ordering its cable system to carry Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri. An opposition to this petition was filed January 19, 1994, to which Douglas has responded.

2. In support of its request, Douglas states that the Malta Bend system serves only 52 subscribers and has only 12 usable, activated channels. Douglas argues that in order to carry Station KMOS-TV it would be forced to remove programming that it has provided to its subscribers at least since March 29, 1990. Douglas maintains that Section 535(b)(2)(B)(iii) of the Cable Television Consumer Protection and Competition Act of 1992,[3] and §76.56(a)(3) of the Commission's Rules specifically exempt small systems, such as Douglas', from the signal carriage requirements applicable to qualified NCE stations. It therefore concludes that it should not be required to add Station KMOS-TV to the Malta Bend system.

3. Station KMOS-TV argues in its response that Douglas' claim that it is not required to add its station because its system has only 12 usable, activated channels, directly conflicts with §615(2)(A) of the 1992 Cable Act which requires that systems with 12 or fewer channels are required to carry the signal of at least one local noncommercial educational television station. Station KMOS-TV avers that at the present time Douglas provides no educational stations to its subscribers. It contends, therefore, that to avoid further irreparable harm to its station, Douglas should be required to add KMOS-TV to its system.

4. In its response, Douglas reiterates its reliance on §76.56(a)(3) of the Commission's rules which states that "cable systems with 12 or fewer usable activated channels *shall not be required to remove any programming service provided to subscribers as of March 29, 1990, to satisfy these requirements*, except that the first available channel must be used to satisfy these requirements (emphasis added)." Since all of the 12 activated channels on the Malta Bend are currently occupied by programming that has been carried since at least March 29, 1990, Douglas maintains that it is not required to add Station KMOS-TV to its system until such time as channel space becomes available on the system.

5. We are not persuaded by the arguments raised by Station KMOS-TV. In support of its petition, Station KMOS-TV contends that §76.56(a)(3) of the Commission's rules is in conflict with the 1992 Cable Act's provisions, §535 (b)(2)(A), which requires cable systems with 12 or less channels to carry one educational station. However, Station KMOS-TV's interpretation of the Act is erroneous. Section 535(b)(B)(iii) clearly provides for an exception to the must-carry requirements for cable systems who have 12 or less channels and which have not changed their lineup since March, 29, 1990. It is undisputed that Douglas falls within this category. It should be emphasized, however, that as soon as channel capacity becomes available on the Malta Bend system, Douglas will be required to add Station KMOS-TV in order to fulfill its obligation to carry at least one NCE station pursuant to §76.56(a)(1)(i) of the Commission's Rules.

6. ACCORDINGLY, pursuant §1.106 of the Commission's Rules, the petition for reconsideration, filed January 13, 1994, on behalf of Douglas Cable Communications II, IS GRANTED and our Order adopted on November 9, 1993 IS RESCINDED.

7. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] An "Emergency Petition for Stay" was filed concurrently with this petition requesting that the Commission stay the effective date of its decision until it acts on Douglas' reconsideration request. In view of our action today, we need not address Douglas' arguments in support of a stay.

[2] *Central Missouri State University against Douglas Cable Communications II*, 8, FCC Rcd. 8712 (1993).

[3] Pub. L. No 102-385, 106 Stat. 1460 (1992)

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of LeSEA Broadcasting Corporation against Cox Cable Communications, Inc. CSR-4453-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1995; Released: June 26, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On January 26, 1995, LeSEA Broadcasting Corporation ("LeSEA"), licensee of broadcast television station WHNO (Channel 20), New Orleans, Louisiana, filed a complaint against Cox Cable Communications, Inc. ("Cox"), operator of cable systems serving Orleans, Jefferson and St. Charles Parishes, Louisiana for failure to carry its signal as required by Section 614 of the Communications Act of 1934, as amended.[1] LeSEA requests that the Commission require Cox to commence carriage of WHNO on its systems serving Orleans, Jefferson and St. Charles Parishes and that the Commission impose such other sanctions as may be appropriate, including a monetary forfeiture. Cox filed an opposition to this complaint on March 1, 1995, to which LeSEA replied on March 15, 1995.

SUMMARY OF PLEADINGS

2. In support of its petition, LeSea states that WHNO is a full-power television station located in New Orleans, Louisiana, and that because Orleans, Jefferson and St. Charles Parishes are all within the New Orleans ADI, WHNO is entitled under Sections 76.55(c) and 76.56(b) of the Commission's rules to carriage on Cox's systems serving those parishes. LeSEA states that WHNO commenced operation on October 21, 1994, and that pursuant to the Commission's regulations governing initial must-carry/retransmission consent elections for new stations, LeSEA notified Cox on October 28, 1994 that it was electing must-carry status on Cox's systems serving Orleans, Jefferson and St. Charles Parishes.

3. In its Opposition, Cox states that the Commission should deny LeSEA's must-carry request on two procedural grounds. First, Cox argues that LeSEA's complaint should be dismissed because it was filed after the 60 day statute of limitations provided in Section 76.7(c)(4)(iii)(B) of the Commission's rules had expired.[2] In particular, Cox states that LeSEA notified Cox of its must-carry election in a September 27, 1994 letter from LeSEA's Vice President to Cox's General Manager, to which Cox did not respond. Cox further states that, under the Commission's sixty day statute of limitations, LeSEA was required to file its complaint by December 27, 1994 (which was sixty days after the expiration of the thirty day period within which Cox was required to respond to LeSEA's alleged must-carry election). Cox concludes that LeSEA's complaint filed January 26, 1995 therefore is untimely.

4. Cox states that LeSEA's September 27, 1994 letter "is quite clearly a demand that Cox begin full carriage of the station immediately."[3] Specifically, Cox cited the following language from the letter:

> Our manager in New Orleans is Everett Strong a veteran radio broadcaster from here in New Orleans, your marketing manager has met with him and informed us that the system is full and the soonest we would be even be considered for full carriage would be next year. This, of course, in unacceptable. We are looking forward toward working with you in positive manners [sic] for the full implementation of the Cable Act.[4]

Cox further states that under the Commission's regulations in effect at the time, September 27, 1994 was the appropriate time for LeSEA to seek carriage of WHNO on the Cox systems. Cox states that under the Commission regulations in effect on September 27, 1994, new television stations were required to make their initial must-carry/retransmission consent election "within 30 days of commencing regular broadcasts."[5] According to Cox, because WHNO commenced operation on October 21, 1994, LeSEA's September 27, 1994 must-carry notice was within thirty days "of commencing regular broadcasts," as contemplated by the Commission's regulations in effect at that time.

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[1] The must carry rights in question were adopted in the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102-385, 106 Stat. 1460 (1992). The Commission adopted implementing regulations in its *Report and Order* in MM Docket 92-259, 8 FCC Rcd 2965 (1993) (*"Report and Order"*). *See also Clarification Order*, 58 FR 32449 (June 10, 1993). 47 U.S.C. § 535.

[2] Under Section 76.7(c)(4)(iii) of the Commission's rules, a must-carry complaint must be filed within 60 days after the date on which the cable operator denies a request for carriage or within 60 days after the 30 day deadline for responding to a request for carriage has expired. 47 C.F.R. §76.7(c)(4)(iii).

[3] Answer, p. 5.

[4] *Id.*

[5] 47 C.F.R. § 76.64(f)(4). The Commission subsequently modified Section 76.64(f)(4) to allow new stations to make their initial must-carry/retransmission consent election "any time between 60 days prior to commencing broadcast and 30 days after commencing broadcast." *Memorandum Opinion and Order* in MM Docket 92-259, 9 FCC Rcd 6723 at ¶94 (1994).

5. Cox's second argument is that LeSEA's complaint should be dismissed because LeSEA failed to serve a copy of the Complaint on the franchising authorities in Orleans, Jefferson and St. Charles Parishes as required by Section 76.7(b) of the Commission's rules.[6]

6. In its Reply, LeSEA states that the September 27, 1994 letter was not intended to be, and indeed under the Commission's rules in effect at the time the letter was sent, could not be, a request for carriage. LeSEA argues that Cox has misinterpreted the Commission's regulations governing initial must-carry/retransmission consent election for new stations. Specifically, LeSEA argues that the Commission's regulations in effect on September 27, 1994 required that new television stations make their initial must-carry/retransmission consent election within 30 days *after* commencing regular broadcasts. LeSEA states that because WHNO did not commence regular broadcasts until October 21, 1994, the September 27, 1994 letter could not have been a request for carriage.[7]

DISCUSSION

7. We agree with LeSEA that the September 27, 1994 letter was not a request for carriage under the Commission's rules in effect at that time, which required that new stations "make their initial [must-carry/retransmission consent] election within 30 days of commencing regular broadcasts." We agree with LeSEA that the Commission intended that new stations make their initial election within thirty days after commencing regular broadcasts, not, as Cox argues, within thirty days before or after commencing regular broadcasts. Our interpretation is supported by the *Report and Order*, in which the Commission stated that new stations will be required "to make initial elections within 30 days *after they begin regular broadcasts*."[8]

8. Other than the alleged procedural deficiencies noted by Cox in its opposition, Cox has not raised any additional grounds for denying WHNO carriage on its systems serving Orleans, Jefferson and St. Charles Parishes. In view of our findings that LeSEA's petition was filed timely, and that LeSEA has cured the service deficiency, we conclude that WHNO is entitled to carriage on Cox's systems serving Orleans, Jefferson and St. Charles Parishes.

ORDERING CLAUSES

9. Accordingly, the petition filed January 26, 1995, by LeSEA Broadcasting Corporation IS GRANTED pursuant to Section 614(d)(3) (47 U.S.C. § 534) of the Communications Act of 1934, as amended, and Cox Cable Communications Inc. IS ORDERED to commence carriage of Station WHNO sixty (60) days from the release date of this order on its system serving Orleans, Jefferson and St. Charles Parishes, Louisiana.[9]

10. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Service Bureau

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[6] Section 76.7(b) of the Commission's rules requires that a must-carry complaint "be accompanied by a certificate of service on any cable television system operator, franchising authority, . . . or other interested person who may be directly affected if the relied requested is granted." 47 C.F.R. §76.7(b).

[7] With respect to the service issue, LeSEA admits in its Reply that it failed to serve copies of its Complaint on all interested parties, but LeSEA further states that it will remedy the service deficiencies by serving copies of the Complaint, together with its Reply, on all interested parties. LeSEA has in fact served a copy of the Complaint and Reply on all interested parties, as required by Section 76.7(b) of the Commission's rules, and the service deficiency noted by Cox therefore has been cured.

[8] *Report and Order*, 8 FCC Rcd at 3003 (emphasis added).

[9] Based upon the totality of circumstances present, we do not believe that any sanctions are warranted against Cox cable Communications, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Tele-Media Company of	CSR-3894-A
Southeastern Florida, Inc.	FL0832
Polk County, Florida	
For Modification of the Tampa-	
St. Petersburg-Clearwater-Lakeland	
and the Orlando-Daytona Beach-Melbourne-	
Cocoa-Clermont, Florida ADIs	

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1994; Released: June 26, 1995

By the Cable Services Bureau:

INTRODUCTION

1. Tele-Media Company of Southeastern Florida, Inc., operator of a cable television system serving Kissimmee, Florida, and neighboring unincorporated areas of Osceola County and Polk County, Florida, has filed the captioned petition for special relief seeking to delete the unincorporated areas of Polk County served by Tele-Media from the Tampa-St. Petersburg-Clearwater-Lakeland, Florida ["Tampa"] "area of dominant influence" for purposes of the cable television mandatory broadcast signal carriage rules with respect to most television broadcast stations licensed to communities within this "area of dominant influence," and to include these unincorporated areas within the Orlando-Daytona Beach-Melbourne-Cocoa-Clermont, Florida ["Orlando"] "area of dominant influence." Tele-Media's petition is supported by WFTV, Inc., licensee of Station WFTV (ABC, Channel 9), Orlando, Florida, and by First Media, L.P., licensee of Station WCPX-TV (CBS, Channel 6), Orlando, Florida. Great American Television and Radio Company, Inc., licensee of Station WTSP-TV (ABC, Channel 10), St. Petersburg, Florida, has filed comments in response to WFTV and First Media. Tele-Media's petition is opposed by Tampa Television, Inc., licensee of Station WFLA-TV (NBC, Channel 8), Tampa, Florida, and Tele-Media has replied.[1]

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][2] and implementing rules adopted by the Commission in its *Report and Order in MM Docket 92-259*,[3] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[4] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[5]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such

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[1] Tele-Media's petition appeared on public notice on July 16, 1993. WFLA-TV's opposition was filed on August 18, 1993, more than twenty days after Tele-Media's petition appeared on public notice. Accordingly, pursuant to §76.7(d) of the Rules, WFLA-TV's opposition is late-filed. WFLA-TV has filed a "Motion to Accept Late Filed Pleading" concurrently with its opposition, claiming that it never received the copy of Tele-Media's petition mailed to the station. Given the circumstances and in the absence of any prejudice therefrom we will accept all pleadings filed in this matter.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] 8 FCC Rcd 2965, 2976-2977 (1993).

[4] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission"s Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[5] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[6]

4. The legislative history of this provision indicates that:

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[7]

5. The Commission provided guidance in its *Report and Order in MM Docket 92-259, supra*, to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[8]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[9] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[10]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[11] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must-carry signals from which to choose, *i.e.*, when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The community here in question, consisting of two neighboring unincorporated areas of Polk County, Florida served by Tele-Media, is located within the Tampa, Florida ADI, at its northeastern edge, adjacent to the Orlando, Florida ADI. The commercial television broadcast stations licensed to communities within the Tampa ADI are: stations WFLA-TV (NBC, Channel 8), WTVT (CBS, Channel 13), WFTS (Fox, Channel 28), and WBHS (HSN, Channel 50), all Tampa, Florida; WTSP-TV (ABC, Channel 10), WTTA (Ind., Channel 38), and WTOG (Ind., Channel 44), all St. Petersburg, Florida; WCLF (Ind., Channel 22), Clearwater, Florida; and WTMV (Ind., Channel 32), Lakeland, Florida. Tele-Media seeks to delete the community in question from the ADIs of each of the above stations, with the exception of WTMV, which is the station in the Tampa ADI whose city of license is closest to the community.

9. Tele-Media states in support of its petition that it has never carried any Tampa market licensees, and that, with the exception of three superstations, every television broadcast station carried by Tele-Media is licensed to the Or-

[6] Communications Act of 1934, as amended, §614 (h)(1)(C)(ii), 47 U.S.C. §534(h)(l)(C)(ii).
[7] H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).
[8] *Id.* at 2977 (emphasis in original).
[9] 8 FCC Rcd at 2977 n.139.
[10] 47 C.F.R. §76.59.
[11] 8 FCC Rcd at 2981.

lando market. Only 990 of the 2479 homes passed by Tele-Media are in Polk County, states the system. The remainder are within the Orlando ADI, fewer than 30 miles from Orlando, which stations, Tele-Media asserts, are more likely to provide local service to the community in question than are stations from the Tampa ADI, with one exception. Tele-Media states that it does not seek to delete the community from WTMV's ADI, as the station is "close enough to northeastern Polk County to provide local service addressing the specific interests and concerns of subscribers." In view of the foregoing, Tele-Media contends that county-wide viewing patterns "are not relevant to this request."

10. In support of Tele-Media's petition, WFTV contends that it provides "substantial local service" to the community, and lists four issues that could affect Polk County which the station has addressed, as well as examples of events in central Florida in which the station is involved. The station also states that it has covered 156 news stories from Polk County from January through June. First Media claims, in support of Tele-Media's petition, that grant of the petition would further Congress' intent that only local stations enjoy mandatory carriage rights on cable systems.

11. While not opposing Tele-Media's petition, Great American urges that such relief as is granted should be limited to only the Tele-Media cable system, "a portion of which serves an extremely limited area in the northeastern corner of Polk County."

12. In opposition, Tampa Television contends that it is unclear whether the petition applies solely to the community served by Tele-Media's system, or to Polk County in its entirety. Tampa Television states that its Grade A contour covers virtually all of Polk County, and its Grade B contour covers the county fully, while the Orlando market NBC affiliate, Television Broadcast Station WESH (NBC, Channel 2), Daytona Beach, Florida, only encompasses part of Polk County with a Grade B contour. Tampa Television states that it provides news, sports, and public affairs coverage to Polk County, and lists samples of such coverage since January 1992. The station also notes that it is involved in local community activities. In contrast, it argues, Tele-Media fails to demonstrate that any Orlando licensee provides programming of particular interest to the community in question. Finally, it contends that viewership data is essential to evaluating Tele-Media's request, and cites Arbitron data indicating that WFLA-TV has a net weekly circulation of over 50% in Polk County.[12]

13. In reply to WFTV and to First Media, Tele-Media reiterates that it seeks relief only in the designated community comprised of two neighboring unincorporated areas of Polk County, and that no franchising authority has opposed Tele-Media's request. In reply to Tampa Television, Tele-Media argues that the station has misconstrued the extent of Tele-Media's request, which is limited to the designated community. WESH's Grade B contour in fact covers the community in question, states Tele-Media. County-wide viewing patterns are not relevant to a request affecting a small community at the edge of a county and the ADI, maintains Tele-Media, and it is "self-evident" that "the Orlando ADI stations will provide more 'local' service" to the community in question than will Tampa or St. Petersburg licensees.

ANALYSIS AND DECISION

14. We will grant Tele-Media's petition only insofar as it involves the specific community in Polk County served in conjunction with Tele-Media's Kissimmee, Florida system and will deny it in all other respects. As a number of the commenting parties note, the Tele-Media filing in places suggests that it is urging that the entire of Polk County be moved from one ADI to another. Such a result in not justified by the information before us nor, as Tele-Media subsequently indicates, was it intended.

15. With respect to the specific Tele-Media community, the factor that weighs most heavily in favor of the request involves historical signal carriage patterns. It is conceded that none of the Tampa ADI station licensees have a history of carriage on Tele-Media's system and that, apart from three superstations, every broadcast station on the system's current line up is licensed to a community in the Orlando ADI. Other major cable systems in Polk County, however, do carry signals from stations in the Tampa ADI. These carriage pattern suggest that there are differences within the county based on the specific market locations of the systems involved and that there is an historic association of the communities served by Tele-Media with the Orlando rather than the Tampa ADI.

16. With respect to local service, petitioner notes that approximately 60 percent of the homes passed by the system are already in the Orlando ADI. The system straddles the ADI boundary and only 990 of the 2,479 homes passed by the system are in Polk County. These 990 homes, it is not disputed, are closer to Orlando than they are to Tampa. They are approximately 24 miles from Orlando and approximately 55 miles from Tampa. There is some information in the record relating to program service and advertiser support from stations in the Orlando market that has been supplied by WFTV in its comments in support. Because this information relates to Polk County as a whole rather than to the specific community here involved and because it involves what it appears may be national or regional as well as local advertisers, we cannot rely heavily on it. However, since Polk is a large county (approximately 50 miles long and 50 miles wide at its widest point) and the cable communities in question are on the very edge of the county nearest to Orlando, we believe it is logical to conclude that the community's association with the Orlando market stations is significantly stronger than are the more distant parts of the county. With respect to viewing patterns, there would appear to be little doubt that the stations from the Orlando market are dominant in terms of cable audience since it is they that have historically been carried and not the stations from the Tampa market.

17. Given the location of the system; a comparison of the signal coverage contours from the two markets; the physical connection and association of the system with the Orlando-Daytona Beach-Melbourne-Cocoa-Clermont, Flor-

[12] Net weekly circulation is a factor in determining whether a station is significantly viewed in a community or a county. For a network station to be deemed to be significantly viewed, it must achieve in noncable homes a share of viewing hours of at least 3% (total week hours) and a net weekly circulation of at least 25%. 47 C.F.R. §76.5(i). WFLA-TV has been found to be significantly viewed in Polk County. *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 388 app. B (1972).

ida ADI; and the historical carriage patterns, we believe that a case for allocating these communities in the manner requested has been made out. Based on a review of the market geography in general and the specific factors set forth above, this appears to be the kind of market boundary adjustment contemplated by §614(h).

ORDER

18. ACCORDINGLY IT IS ORDERED, pursuant to §614(h)(1)(C) of the Communications Act of 1934, as amended (47 U.S.C. §534(h)(1)C)) and §76.59 of the Commission's Rules (47 C.F.R. §76.59), That the captioned petition for special relief filed June 2, 1993 by Tele-Media Company of Southeastern Florida, Inc. IS GRANTED.

19. This action is taken by the Cable Services Bureau pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Meredith Corporation CSR-4008-A
Orlando, Florida

For Modification of Television Broadcast
Station WOFL-TV's ADI

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1995; Released: June 26, 1995

By the Cable Services Bureau:

INTRODUCTION

1. In the captioned proceeding, Meredith Corporation ("Meredith"), licensee of Television Broadcast Station WOFL (Fox, Channel 35), Orlando, Florida, has requested the Commission to include all of the communities in Polk County and Indian River County, Florida ("the Communities") within the Orlando-Daytona-Melbourne "area of dominant influence" ("ADI") for purposes of the cable television broadcast mandatory signal carriage rules. TVT License, Inc., licensee of Television Broadcast Station WTVT (CBS, Channel 13), Tampa, Florida, and Tampa Bay Television, licensee of Television Broadcast Station WFTS (Fox, Channel 28), Tampa, Florida filed oppositions to the petition with respect to the inclusion of the communities in Polk County. Four parties filed oppositions to the petition with respect to the inclusion of the communities in Indian River County: TCI of Northern New Jersey, Inc., d/b/a TCI Cablevision of the Treasure Coast ("TCI"); Krypton Broadcasting of Fort Pierce, Inc., licensee of WTVX (CBS, Channel 34), Fort Pierce, Florida; Malrite Communications Group, Inc., licensee of WFLX (Fox, Channel 29), West Palm Beach, Florida; and Photo Electronics Corporation, licensee of WPEC (ABC, Channel 12), West Palm Beach, Florida. WOFL filed a consolidated reply to these oppositions.

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection (and Competition Act of 1992 ["1992 Cable Act"][1] and implementing rules adopted by the Commission in its *Report and Order in MM Docket No. 92-259*,[2] commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence" or ADI as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. Under the Act, however, the Commission is also directed to consider changes in ADI areas. Section 614(h) provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as -
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;
>
> (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and
>
> (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 614(h)(1)(C) of the 1992 Cable Act specifies that a broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission"s Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

[5] Communications Act of 1934, as amended, §614 (h)(1)(C)(ii), 47 U.S.C. §534(h)(l)(C)(ii).

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided guidance in its *Report and Order in MM Docket 92-259, supra,* to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.,* rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.[7]

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[8] The rules further provide, in accordance with the requirements of the Act, that a station not be deleted from carriage during the pendency of an ADI change request.[9]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of its activated channel capacity to compliance with the mandatory signal carriage obligations, 2) the station is responsible for delivering a good quality signal to the principal headend of the system, 3) indemnification may be required for any increase in copyright liability resulting from carriage, and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried or the signals of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only a single affiliate of a broadcast network, it is obliged to carry the affiliate from within the ADI whose city of license is closest to the principal headend of the cable system.[10] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights; simply provide the system operator with an expanded list of must carry signals from which to choose, *i.e.,* when it has used up its channel capacity mandated for broadcast signals carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority.

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities at issue in this proceeding are located in Polk County and Indian River County, Florida. Polk County is within the Tampa-St. Petersburg ADI, and Indian River County is within the West Palm Beach-Ft. Pierce-Vero Beach ADI. WOFL is located in Orlando, Florida in the Orlando-Daytona-Melbourne ADI.

9. In support of its petition to add Polk County to its ADI, WOFL argues that it has been carried on seven different cable systems in Polk County since as early as 1984, citing to the *Television and Cable Factbooks* for various years as evidence that WOFL has been continuously carried and is currently carried on these systems.[11] Regarding local coverage, WOFL attaches to its petition a copy of its coverage map which shows that it places a Grade B contour over the Northeast portion of Polk County.[12] In addition, WOFL states that it is the closest geographic Fox affiliate for over half of the residents of Polk County, and that it provides news stories, announcements, weather bulletins and public affairs programs which all feature information of interest to Polk County residents. Furthermore, Petitioner states that it is a sponsor of the Kids Club which provides a news letter to each member in Polk County and that the substantial number of Kids Club members is strong evidence of WOFL's service to Polk

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6 H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992).
7 *Id.* at 2977 (emphasis in original).
8 8 FCC Rcd at 2977 n.139.
9 47 C.F.R. §76.59.
10 8 FCC Rcd at 2981.
11 These systems include: People's Cable Inc. since at least 1990; Paragon Cable since at least 1989; American TV and Communications (formerly Centel Cable TV Co. of Florida) since at least 1989; American Cablevision Services, Inc. since at least 1984; Tele-Media Co. of S.E. Florida (formerly Tele-Media of Citrus) since at least 1991; Storer Cable TV of Florida since at least 1989; and USA Cablesystems, Inc. (formerly Southeast I Cable Systems, Inc.) since at least 1991.
12 *See* Petition, Exhibit A.

County.[13] To show viewing patterns in the communities, Petitioner provides the 1992 Nielsen NSI Florida County Coverage Study showing that WOFL earned a three share for all day viewing and 34 percent net weekly circulation in cable and non-cable households in Polk County.[14] Finally, as an additional factor in support of its petition, WOFL lists a number of companies "with stores and/or offices in Polk County" that advertise on WOFL "and clearly expect that such advertising canbe seen on cable in the community of their national headquarters."[15]

10. In support of its petition to add Indian River County to its ADI, WOFL states that it has been and is currently carried on Falcon Cable TV's Sebastian system (formerly Jones Intercable Inc.). WOFL cites the *Television and Cable Factbooks* for 1984 and 1989-1993 in support. WOFL also states that the TCI system in Indian River County has consistently refused to carry the station. Regarding local coverage, WOFL admits that it does not place a predicted Grade B contour over Indian River County, but contends that the Sebastian system, which has carried WOFL since at least 1984, recently installed a new antenna that receives the station's off-air signal at a level of -31 dBm. Furthermore, WOFL maintains that it provides programming of interest to Indian River County viewers with its local news updates, a public service event bulletin board, Emergency Weather Bulletins, a weekday morning public affairs program, and its sponsorship of the Kids Club in Indian River County. Petitioner admits that two West Palm Beach stations cover Indian River County with a Grade B signal, but concludes that the lack of any additional stations shows that the county is underserved by over-the-air television stations within its own ADI. With respect to local viewing patterns in Indian River County, WOFL provides evidence that in 1992 it earned a one share for all day viewership, and a 12 net weekly circulation in combined cable and non-cable homes. Finally, in additional support of its arguments, WOFL provides a list of Indian River County advertisers which have been consistent sponsors of WOFL's programming.

11. In its opposition to WOFL's petition with respect to the addition of the communities in Polk County, WTVT argues that the petition is procedurally deficient because it focuses on the entire county instead of providing evidence regarding the individual communities in that county.[16] In addition, WTVT maintains that WOFL has failed to meet the four statutory factors for ADI modification. First, WTVT contends that WOFL has not demonstrated a history of carriage because of the 14 years it has been on the air, the greatest length of time the station has been carried on any Polk County cable system is approximately five years. Second, WTVT argues that not only does WOFL's Grade B signal cover only the northeast corner of Polk County, but more importantly that Petitioner fails to identify which, if any, Polk County communities are located within the contour. Third, WTVT maintains that WOFL has failed to provide specific information regarding its coverage of news and events of interest to Polk County and that the number of members in WOFL's Kids' Club is not only inconsequential, but it also appears as if a number of the members listed by WOFL do not reside in Polk County. WTVT also asserts that Orlando's proximity to the nearest point in Polk County is irrelevant as is the fact that WOFL previously attained significantly viewed status in Polk County. Finally, WTVT argues that given that WOFL is licensed to Orlando, we can only assume that the advertisers on WOFL primarily expect to reach the Orlando market, and that we can assume nothing about the Polk county market.

12. WFTS, the Fox affiliate in the Tampa-St. Petersburg ADI which includes Polk County, opposes WOFL's petition on the grounds that Petitioner has failed to provide support for many of the factual allegations in the pleading. Regarding historical carriage, WFTS argues that not only did Petitioner not include copies of the *Television and Cable Factbook* pages which it referenced, but that even this would not have been sufficient because the Commission's *Report and Order* states that historical carriage can be illustrated by documents such as rate cards showing the cable system's channel line-up.[17] In addition, WFTS argues that Petitioner's coverage map confirms that the station places a Grade B signal contour over only the very northeast corner of Polk County. Furthermore, WFTS maintains that with regard to whether any other station qualified for carriage provides local coverage, WOFL fails to provide information showing the extensive local coverage provided by Tampa-St. Petersburg stations to Polk County. WFTS also argues that Nielsen viewership data for 1992 for Polk County demonstrates that WFTS is viewed more heavily than WOFL in both cable and non-cable homes in Polk County, and that WOFL's total share dropped in 1993. Finally, WFTS contends that the conclusions drawn by WOFL with respect to advertisers in Polk County do not advance the station's petition.

13. TCI, WTVX, WFLX, and WPEC all presented similar arguments in opposition to WOFL's petition with regard to the addition of the Indian River County communities.[18] TCI states that it is opposed to the addition of the communities in the southern two-thirds of Indian River County which it serves. WTVX, WFLX, and WPEC oppose the addition of all the communities in Indian River County. The parties are opposed to WOFL's petition on the grounds that Petitioner failed to meet the four statutory criteria for ADI modification. First, all four parties in opposition contend that WOFL's historical carriage on Falcon Cable is discounted by the fact that TCI, the system which has never carried WOFL, serves approximately 80 percent of the residents of Indian River County. TCI contends that it has never carried WOFL because it is already carrying WFLX, the Fox affiliate from its own ADI. TCI and WTVX maintain that because there has been no his-

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[13] *See* Petition, Exhibit F at 1-2.

[14] *See* Petition, Exhibit C.

[15] Petition at 8.

[16] WTVT also argues that any deviation from the community specific requirement must be accompanied by an appropriate waiver request, that WOFL's petition failed to request such a waiver, and that the petition should therefore be dismissed or denied.

[17] 8 FCC Rcd at 2977.

[18] In addition to failing on substantive grounds, WFLX argues that WOFL's petition is procedurally defective because WFLX has failed to support the petition with specific detailed information and because the petition does not demonstrate a clear public interest as required by the Commission's rules.

torical carriage on TCI's system there is no potential for subscriber disruption should the Commission deny WOFL's petition.

14. Regarding the second statutory requirement that the petitioning station show local coverage or service to the communities at issue, TCI, WTVX, WFLX, and WPEC agree that WOFL fails to place a grade B signal over any portion of Indian River County. In addition, TCI, WFLX, and WPEC maintain that WOFL's transmitter is approximately 80 miles from Vero Beach, the major population center of Indian River County. TCI notes that WOFL's off-air signal is received by Falcon Cable in northern Indian River County only because Falcon installed "very special equipment" on a 400-foot tower and that this demonstrates that WOFL cannot be significantly viewed in Indian River County without the special equipment. Furthermore, all four parties in opposition argue that WOFL does not provide specific examples of local programming, nor does it show that its programming is responsive to the needs and/or interest of the residents in the specific communities in Indian River County. The parties also note that the majority of the members listed in the Kids Club do not live in Indian River County and that because the Kids Club is actually a Fox Network promotion, WFLX provides the same program in the West Palm Beach-Ft. Pierce-Vero Beach ADI.

15. In an attempt to diminish WOFL's arguments regarding the lack of local coverage by other television stations, TCI lists a number of stations which can be received off-air by residents of TCI's communities, and WTVX, WFLX, and WPEC also provide evidence of local coverage to the Indian River County communities. Furthermore, TCI argues that WFLX, the West Palm Beach Fox affiliate, is closer to TCI's Vero Beach headend than is WOFL.

16. With regard to local viewing patterns, all four parties in opposition argue that WOFL's low viewership accurately reflects marketplace conditions in Indian River County. The parties note that in contrast, WTVX and WFLX receive much higher ratings than WOFL and that all stations in the West Palm Beach-Ft. Pierce-Vero Beach ADI enjoy higher viewership ratings in Indian River County than television stations from the Orlando-Dayton Beach-Melbourne ADI. TCI notes that the 1992 Nielsen NSI viewership data submitted by WOFL shows that it has no non-cable market share in Indian River County, presumably because it cannot be received off-air.

17. Finally, TCI and WFLX assert that most of the advertisers listed in WOFL's petition are statewide or regional and not limited to Indian River County. As such, TCI and WFLX argue that WOFL's contentions regarding the advertisers are misleading and probably reflect the advertisers' intent to advertise in Orlando, WOFL's city of license.

18. WOFL filed a consolidated reply to the oppositions. In response to objections by WTVT, WFLX, and WFTS that its petition is procedurally defective because it lacks sufficient specific evidence to show that its ADI should be modified, WOFL argues that it has provided sufficient supporting information, including the facts contained in the petition itself, a Declaration of the Vice-President and General Manager of the station, and numerous exhibits. In addition, WOFL argues that the 1992 Cable Act does not require the submission of special community-by-community surveys to demonstrate viewership and that the county-wide data WOFL submitted in support of its petition is sufficient to demonstrate viewership levels warranting a modification of its ADI.

19. In addition to arguing that its petition is not procedurally defective, WOFL also contends that it has met the four-prong test for including the communities in both Polk County and Indian River County in its ADI. With respect to the communities in Polk County, WOFL replies that first, not only has it shown historical carriage dating back to 1984 on the American Cablevision Services system, but it also attaches to its Reply additional evidence, as requested by WTVT, demonstrating that WOFL has met the historic carriage requirement. Addressing the second and third statutory requirements simultaneously, WOFL maintains that not only does it provide evidence of local programming such as the Hurricane Andrew public service announcements and its Kids Club membership, but that WFTS does not appear to provide local programming that is any more substantial.[19] Finally, WOFL replies that the county-wide viewership data it submitted shows that it warrants carriage on cable systems as a must-carry station in Polk County.

20. With respect to the communities in Indian River County, WOFL admits that the evidence regarding historic carriage is not as significant as in Polk County, but it also attributes this lack of carriage to TCI's "steadfast refusal" to carry WOFL over the years. WOFL maintains that TCI's refusal to carry the station should not, however, be an indication that the signal is not deserving of must-carry status. Moreover, WOFL replies, WFLX's attempt to downplay WOFL's carriage on the Falcon system serving Sebastian must not be given any weight. Referring to an attached memo from Falcon management, WOFL emphasizes that 90% of Falcon's 8000 subscribers are located in Indian River County. Regarding its local coverage of the Indian River County communities, WOFL admits that while it does not place a Grade B signal over the county, neither does WFLX.[20] In addition, WOFL maintains that its coverage of Hurricane Andrew and its educational children's programming, evidenced by WOFL's Kids Club members from Indian River County, shows that WOFL provides programming of interest to Indian River County residents. WOFL also attempts to refute the opposing arguments made regarding service to Indian River County by existing local stations. WOFL notes that TCI carries only nine commercial stations, as opposed to the 11 TCI states that it carries and only five of these are currently must-carry stations demonstrating, WOFL argues, that Indian River County is underserved by local stations. Finally, regarding the fourth statutory factor, viewership, WOFL defends its evidence stating that "because of the high cable penetration in Indian River County, noncable viewership figures are unavailable," and that TCI's refusal to carry WOFL on its system has resulted in WOFL having a low overall rating.

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[19] In addition, WOFL notes that portions of Polk County to the south and east are not covered by WFTS' Grade B signal.

[20] WOFL states that WFLX relies on a translator to deliver its signal to noncable homes in Indian River County. Furthermore, WOFL believes it is significant that two stations that do place a Grade B signal over the area are not even carried on the TCI system.

ANALYSIS AND DECISION

21. WOFL has not provided sufficient evidence to justify its market modification request with respect to the communities of Polk County and Indian River County, Florida. Accordingly, its petition will be denied. As a preliminary matter we address the contention that WOFL's petition is procedurally defective for its failure to provide evidence regarding the specific communities within Polk and Indian River Counties. The 1992 Cable Act authorizes the Commission to modify ADI's to eliminate or include "communities." We do not read the word "community" as it is used in §614(h), in its legislative history,[21] or as used in cable regulation generally to mean "county." To allow stations or cable operators to seek to include or exclude entire counties from a particular ADI without regard to the individual circumstances of the communities or franchised areas within such counties would not facilitate an evaluation of the specific modification criteria provided for in the Act and thus an identification of the specific communities within the county has generally been required.[22] However, WOFL is correct in arguing that the Commission specifically stated that in marketx modification cases it would not restrict the type of evidence that parties may submit.[23] Therefore, rather than reject the petition on procedural grounds, we will evaluate the substance of WOFL's petition and the record before us to determine the propriety of adding the communities in Polk and Indian River Counties to WOFL's ADI.

22. Of the four statutory factors specified in the 1992 Cable Act, we find that WOFL has met only one and that one only partially -- the historical carriage requirement. WOFL demonstrates that the station has been carried by a number of Polk County cable systems since as early as 1984 and on one Indian River County system since at least 1984. While this factor is entitled to considerable weight, especially with regard to Polk County, it does not by itself and in the absence of satisfactory evidence satisfying the other factors, demonstrate that a change in its market boundary is warranted.

23. With respect to local coverage, the second statutory factor, we have stated that parties may demonstrate that the station places at least a Grade B coverage contour over the cable communities or is located close to the communities in terms of mileage.[24] Although WOFL has shown that it places a Grade B contour over portions of Polk County, it does not indicate which communities are included in this area. Furthermore, WOFL does not place a Grade B contour over any portion of Indian River County. As WOFL argues, however, failure to place a Grade B contour over the communities does not automatically warrant a denial of station's ADI modification petition where the station can show geographic proximity and programming which serves the interests of the communities in question. We find that WOFL has also failed to show that it is any closer to the communities than Tampa or West Palm Beach stations, or that it provides programs of interest to either the Polk County or Indian River Communities. First, the evidence submitted by WOFL's regarding its local programming is meager. WOFL provides no programming logs or lists of programs or issues covered other than Hurricane Andrew and other weather emergencies announcements. In addition, as stated *supra*, WOFL fails to provide any evidence regarding the specific communities in each of the counties. While we accept WOFL's argument that community specific viewership data is expensive to obtain, such contentions do not hold true with respect to evidence of community specific programming.

24. While WOFL presented little evidence regarding whether any other must carry stations serve the communities, the record shows that in addition to other stations, WFTS, the Fox affiliate in the Tampa-St Petersburg ADI and WFLX, the Fox affiliate in the West Palm Beach-Ft Pierce-Vero Beach ADI are must carry stations serving Polk County and Indian River County, respectively.[25] We do not believe that Congress intended the third criterion to operate as a bar to a station's ADI claim whenever other stations could also be shown to serve the communities at issue. Rather, we believe that this criterion was intended to enhance a station's claim where it could be shown that other stations do not serve the communities at issue. However, the presence of other stations which serve the communities in Polk County and Indian River County does not permit us to weigh this factor in favor of WOFL's petition.

25. Finally, WOFL's evidence relating to viewing patterns in the communities in question also does not suggest a close association of the communities with WOFL or that the market structure should be revised. The 1993-1994 Arbitron County Coverage data show that WOFL earned a weekly share of 2 and a net weekly circulation of 28 for cable and non-cable homes in Polk County, comparatively, WFTS earned a 6 share and a 52 net weekly circulation. In Indian River County, WOFL's viewership is even lower. The 1993-1994 Arbitron data shows that WOFL earned a 1 share and a 12 net weekly circulation. In addition, Arbitron does not provide a breakdown of WOFL's viewer data for cable and non-cable home, presumably because the numbers for non-cable homes are so low because so few residents of Indian River County are able to receive WOFL off-air. While the Commission has not adopted a minimum level of acceptable share or net weekly circulation for satisfying the fourth statutory factor, WOFL's numbers, when compared with those of other stations in both Polk and Indian River Counties, do not show that its viewership in cable and non-cable homes in the two counties rises to a level which demonstrates that the communities therein form part of WOFL's economic marketplace, especially given the findings herein that WOFL has failed to show that it meets the second and third statutory requirements for ADI modification.

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[21] *See* H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

[22] We recently denied a cable operator's plea to exclude a station from particular markets partly because it asked that entire counties be removed from an ADI. *See TeleMedia Corporation*, 10 FCC Rcd 134 (1994).

[23] 8 FCC Rcd at 2977.

[24] 8 FCC Rcd at 2977.

[25] WFTS Opposition at 3, Exh. 2; TCI Opposition at 8; WTVX Opposition at 4-5; WFLX Opposition at 13-14; and WPEC Opposition at 8-11.

ORDER

26. Accordingly, IT IS ORDERED, pursuant to §614 of the Communications Act of 1934, as amended (47 U.S.C. §534), and §76.59 of the Commission's Rules (47 C.F.R. §76.59), that the petition for special relief filed August 2, 1993 by Meredith Corporation IS DENIED.

27. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

BUSTER BROWN, KENT HANCE
TOM LUCE, JIM MATTOX,
ROBERT MOSBACHER, JR.,
TOM PHILLIPS, ANN RICHARDS,
AND CLAYTON WILLIAMS

Against Station KENS-TV
San Antonio, Texas

ORDER

Adopted: June 21, 1995; Released: June 27, 1995

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint concerning the March 13, 1990, primary; the April 10, 1990, run-off; and the November 6, 1990, general election in Texas. The complaint was filed July 8, 1993, on behalf of Buster Brown, Kent Hance, Tom Luce, Jim Mattox, Robert Mosbacher, Jr., Tom Phillips, Ann Richards, and Clayton Williams (hereinafter, collectively, "Complainants");[1] a motion to dismiss and a motion for extension of time within which to file an answer to the complaint, both filed July 27, 1993, by Harte-Hanks Television, Inc., licensee of station KENS-TV, San Antonio, Texas ("KENS"); and related pleadings.[2]

2. As a preliminary matter, KENS' Contingent Request for Extension of Time to File an Answer on the Merits asks the Commission for an opportunity to file an answer in the event that we determine that the complaint is timely filed. However, the Commission's procedures contemplate only a complaint and an answer. The answer is to be filed within ten days, if the station so desires. *See Lowest Unit Charge Requirements*, 6 FCC Rcd 7511, 7513 (1991), ("*Declaratory Ruling*") *recon. denied*, 7 FCC Rcd 4123 (1992) ("*Reconsideration Order*"). The station could have filed both its motion to dismiss and its answer within the ten day period. Thus, KENS's Motion for Extension of Time is denied.

3. Complainants allege that KENS overcharged them during the 1990 primary and general elections in violation of the requirements of §315(b) of the Communications Act of 1934, as amended.[3] Complainants also allege KENS discriminated in the advertising rates charged candidates in violation of §73.1941(e) of the Commission's Rules.

4. We have analyzed the complaint pursuant to the guidelines set forth in the *Declaratory Ruling*. We find that the complaint is timely filed and that complainant Clayton Williams has established a *prima facie* case of a violation by KENS of the LUC requirements of §315(b)(1) of the Communications Act for the 1990 primary and general election periods. Complainants Ann Richards and Robert Mosbacher, Jr., have established a *prima facie* case of an LUC violation by Station KENS for the 1990 general election period. Complainant Jim Mattox has established a *prima facie* case of an LUC violation by Station KENS with respect to the 1990 primary and primary run-off election periods. Complainant Kent Hance has established a *prima facie* case of an LUC violation by Station KENS with respect to the 1990 primary election period. Complainants have failed to establish a *prima facie* case with respect to the allegations that KENS discriminated among candidates in the rates charged. Since no information was submitted regarding the purchase of advertising time by Luce, Phillips or Brown, it is not possible to determine whether they were overcharged. As a result, all claims by Luce, Phillips and Brown against KENS will be dismissed. Following is a discussion of the Bureau's findings with respect to all the issues raised, and a timetable and procedures for resolving those portions of this complaint presenting a *prima facie* case.

TIMELINESS OF COMPLAINANTS' ACTION

5. KENS requests dismissal of the complaint without reaching the merits of Complainants' allegations. KENS argues that the complaint is untimely in that it was filed more than three years after the 1990 primary election and more than two and one-half years after the 1990 general election. In support, KENS asserts that the Commission has used the two-year political file retention period as an appropriate benchmark to test the vitality of arguably un-

[1] Richards and Williams were candidates for Governor in the primary and general elections. Mattox and Hance were candidates for Governor in the primary election. Richards and Mattox were candidates for Governor in the run-off primary election. Mosbacher was a candidate for Lieutenant Governor in the primary and general elections. Luce was a candidate for Governor, Phillips was a candidate for Chief Justice, and Brown was a candidate for Attorney General. No additional information on Luce, Phillips, or Brown was provided.

[2] Also before us are an opposition to the motion to dismiss and the extension request filed by Complainants August 4, 1993, and a reply to the opposition filed August 10, 1993, by KENS. Inasmuch as oppositions and replies are permitted pursuant to §1.45 of the Commission's Rules, we will consider those pleadings herein. However, as stated in *L. Douglas Wilder and Marshall Coleman (WRIC-TV)*, 9 FCC Rcd 7951 (MMB 1994), in the future we will consider only those pleadings contemplated by the procedures set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992). Accordingly, oppositions and replies to oppositions filed pursuant to §1.45 of the Rules will not be considered if filed after December 23, 1994.

[3] §315(b) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary run-off election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same time period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. § 315(b).

timely complaints. The station also cites our decision in *WTVT* in which we noted that at the time the complaint was filed, WTVT's political file should have contained the material pertaining to the 1990 election at issue. *WTVT*, 7 FCC Rcd at 6661, n.4 , and *Lawton Chiles, Bob Martinez, Bill Nelson and Jim Smith (WCIX-TV)*, 8 FCC Rcd 4019, n.5 (MMB 1993) (*"WCIX-TV"*) (in which we refused to dismiss a case on the basis of timeliness "in light of the fact that stations must maintain their political files for a period of two years after the elections").

6. KENS further asserts that the delay places KENS at a significant disadvantage because, as of November 6, 1992, KENS was no longer required to keep in its public files any information relating to the Complainants' purchase of advertising time on the station during either the 1990 primary or general election.[4] The station also notes that some of the personnel responsible for sales of political time on the station, especially those by the station's national sales representative, have left, and even employees still at the station have only limited recollection regarding the relevant transactions.

7. Separately, KENS asserts that the complaint should be dismissed because Complainants have failed to support their claims with a declaration or affidavit from any candidate with personal knowledge of the allegations made.

8. Complainants oppose KENS's motion to dismiss, arguing that the complaint is timely. They assert that Congress did not intend that there be any time limitations in §315(b) actions, and that, where Congress does not provide a statute of limitations for an implied federal cause of action, a court should apply the local limitation applicable to similar claims. Consequently, Complainants assert, we should borrow from Texas Law, which states that any statute of limitations should be a minimum of four years. Tex. Civ. Code Ann. §16.004 (Vernon 1992). Complainants also argue that the requirement that licensees keep certain information in the political file for a period of two years is not relevant to whether there is a statute of limitations. They argue further that at issue are commercial contracts and not the material that is in the political file, which is already available to candidates. In addition, Complainants assert that KENS was put on notice regarding their claims as early as June 1991, when they first contacted the station, and that none of KENS' records relevant to their claims should have been destroyed.[5] Finally, Complainants discount KENS's argument that relevant sales personnel may no longer be at the station on the grounds that KENS, not its employees, is responsible for the station's actions.[6]

9. In its reply to the opposition, KENS argues that its dismissal motion is appropriate given the staleness of the claim, and argues that our procedures have not foreclosed the filing of appropriate pleadings in this regard. The station further argues that the Commission is not precluded from establishing a statute of limitations in cases subject to §315 of the Act, and urges the Commission to apply the doctrine of laches to bar the claim. In addition KENS argues that reference to local statutes of limitation is not appropriate in LUC cases because such claims are an exclusively federal cause of action. KENS also denies that any correspondence from Complainants served as notice of an impending claim against it. Finally, KENS opposes Complainants' request for punitive damages, attorneys' fees, and interest.

10. We conclude that the complaint is timely filed. Contrary to KENS's assertion, we believe that the Commission has not "implicitly" recognized a two-year statute of limitations for LUC complaints. The comment in footnote 46 of the *Reconsideration Order* states that the political file retention is for a period of two years. It does not establish a statute of limitations. Our reference to the two-year retention period in *WTVT* and *WCIX* recognized only that documents pertaining to candidate purchases should still be available in the file. These statements do not mean that the statute of limitation period for LUC cases should be limited to two years. Indeed, we have entertained LUC cases that have been filed beyond the two-year period following an election. *See Ann Richards, Clayton Williams, Jim Mattox, Tom Luce, Kent Hance, Robert Mosbacher, Jr., Tom Phillips, and Buster Brown (KBMT-TV)*, 9 FCC Rcd 6051 (1994).

11. Further, KENS has not persuaded us that equitable considerations warrant dismissal of the complaint as untimely. Although KENS argues that the two-year retention period had passed prior to the filing of the complaint, it does not assert that, in fact, it has destroyed, in the regular course of business, the commercial records necessary to resolve this complaint. In addition, even if records are not discoverable, the likelihood is that the Complainants, rather than the licensee, will be harmed.[7]

12. KENS claims that the complaint is fatally defective because it is not properly verified. While the complaint includes declarations by Complainants' counsel, we agree that those declarations are not based on personal knowledge of the facts. As we stated in *WTVT*, 7 FCC Rcd 6661, at n.6, it is our preference that candidates verify their complaints. In the absence of a specific Commission requirement for such a statement, however, we will not dismiss a complaint on these grounds.

OVERCHARGE ALLEGATIONS

13. To establish a *prima facie* case, a complainant must, at a minimum, submit "a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513. A complainant must describe the specific factual basis for its belief that a station has committed a violation, rather than, for example, merely making a general allega-

[4] KENS denies that it had any notice from Complainants about the specific charges that they were planning to bring and, therefore, it could not anticipate which records to preserve.

[5] Complainants also assert that contract claims in Texas are subject to a limitation of at least four years, and that, if the jurisdictional issue currently pending in *Zell Miller v. FCC*, No. 92-8777 (11th Cir., filed August 11, 1992), is resolved by a determination that the Commission does not have exclusive jurisdiction over claims filed pursuant to Section 315 of the Act, KENS will be subject to a suit on the contract in a state court.

[6] Complainants seek to supplement their complaint to request punitive damages as a result of KENS's "delay tactics," and renew their request for interest and attorneys' fees as listed in the original complaint. KENS opposes Complainants' request. We need not decide here whether the Commission has the authority to employ such remedies as we do not find, at this time, that any of these remedies are warranted in this case.

[7] We agree with Complainants that the commercial documents are as important, if not more important, than documents in the political file, most of which are already available to the Complainants. Thus, we are not persuaded that exclusive reliance on the political file retention period has merit.

tion that a station has overcharged candidates. Only complainants Hance, Mattox, Mosbacher, Richards and Williams provided evidence to support their allegations of overcharges.

14. To show that KENS overcharged those candidates, Complainants submit projections of average spot rates for KENS for all four quarters in 1990 based on data in Spot Cost Outlook and Projections ("SCOOP") and Arbitron ratings for the stations based on Households for all four quarters of 1990 and Adults ages 25-54 for the first three quarters of 1990.[8] The complaint then compares those rates with rates actually charged candidates. Complainant Williams has shown that, in a substantial number of instances, SCOOP rates were lower than the rates he was charged during the 1990 primary and general election periods.[9] Therefore, this candidate has established a *prima facie* case as to the issue of overcharges during the periods preceding the 1990 primary and general elections. Complainants Richards and Mosbacher have shown that, in a substantial number of instances, SCOOP rates were lower than the rates they were charged for the period preceding the 1990 general election.[10] Therefore, these candidates have established a *prima facie* case as to the issue of overcharges during the period preceding the 1990 general election. Complainant Mattox has shown that, in a substantial number of instances, SCOOP rates were lower than rates actually charged him for the periods preceding the 1990 primary and primary run-off elections.[11] Therefore, this candidate has established a *prima facie* case as to the issue of overcharges during the periods preceding the 1990 primary and primary run-off elections. Complainant Hance has shown that, in a substantial number of instances, SCOOP rates were lower than rates charged him for the period preceding the 1990 primary.[12] Accordingly, this candidate has established a *prima facie* case as to the issue of overcharges during the period preceding the 1990 primary.[13] Because Complainants who provided evidence of purchasing advertising time have established a *prima facie* case with respect to their overcharge claims, we will not independently consider the commercial invoices also presented to establish this same claim.

ALLEGED RATE DISCRIMINATION

15. The complaint alleges that KENS discriminated in the advertising rates which it charged different candidates, in violation of §73.1941(e) of the Commission's Rules. Complainants cite several examples, for the periods preceding both the 1990 primary and general elections, of different rates charged to various candidates for advertising during the same daypart. However, the complaint does not indicate the class of the spots. Instead, Complainants argue that class distinctions are not valid because lower-priced spots were functionally the same as fixed and preemptible-with-notice spots.[14] Because Complainants havenot provided information as to class, they have failed to establish a *prima facie* case with respect to rate discrimination.

TIMETABLE AND PROCEDURES FOR DISCOVERY

16. In the *Declaratory Ruling*, the Commission determined that, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery, subject to specific conditions established by the Bureau. *See Declaratory Ruling* at 7513-14, 7521, n.49. *See also, WTVT* at 6665. Accordingly, we will allow Complainants Hance, Mattox, and Williams limited discovery on the issue of overcharges during the 45 days before the March 13, 1990, primary. We will allow Complainant Mattox limited discovery on the issue of overcharges during the 45 days preceding the April 10, 1990, primary run-off election. We will allow Complainants Mosbacher, Richards and Williams limited discovery on the issue of overcharges during the 60 days preceding the November 6, 1990, general election. The documents set forth in Appendix A to this *Order*, and answers to the written interrogatories set forth in Appendix B to this *Order*, must be served upon counsel for Complainants Hance, Mattox, Mosbacher, Richards and Williams (not the Commission) by KENS on or before the first day of the discovery period, which will be 30 days after the release date of this *Order*. *See* Appendix C.

17. Any request for further discovery by Complainants Hance, Mattox, Mosbacher, Richards and Williams must contain a showing that such discovery is necessary to resolve the issue of overcharges. Any discovery request by KENS for production of documents, answers to written interrogatories, or for the taking of depositions must demonstrate that the information requested is necessary for KENS to respond to arguments or claims that could be made by Complainants Hance, Mattox, Mosbacher, Rich-

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[8] In our consideration of this issue, we looked only at the HH (Households) calculations and not the 25-54 calculations submitted for the first, second and third quarters.

[9] In this connection, we note that for the 1990 primary election period, Williams had 5 out of 7 instances alleged in which the rate he was charged exceeded the SCOOP rate and 47 out of 49 instances alleged during the 1990 general election period.

[10] For the 1990 general election period, all of the 124 instances alleged by Richards exceeded the SCOOP rate, and 56 instances out of 58 instances alleged by Mosbacher exceeded the SCOOP rate.

[11] All of the 44 instances alleged as overcharges during the 1990 primary election period and all of the 21 instances alleged by Mattox as overcharges during the 1990 run-off election period exceeded the SCOOP rate.

[12] During the 1990 primary election period, all of the 75 instances alleged to be overcharges by Hance exceeded the SCOOP rate.

[13] Complainants Richards and Mosbacher made no allegation that they were overcharged for spots purchased during the period preceding the 1990 primary, and provided no evidence of charges for spots purchased during this period. In addition, Richards made no allegation or showing with respect to the 1990 run-off primary. Accordingly, these Complainants were not included in our analysis of those election periods.

[14] Complainants appear to assert that if a preemptible rate clears during a specific time period, that rate automatically becomes the functional equivalent of fixed time. We disagree. Preemptible classes of time have associated risks of preemption, and it is that risk that characterizes the spot, not whether the spot actually clears. Complainants have not presented evidence sufficient to persuade us that the likelihood of preemption for a particular time period was so low as to render the preemptible time sold during that period the functional equivalent of fixed time.

ards and Williams in their amended complaint. We emphasize that any request for depositions must also demonstrate that depositions are necessary to resolution of the issue of overcharges and include a list of the proposed deponents.[15] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible.

18. Documents produced by KENS that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, the name(s) of any person employed by the advertiser, and the name of any media company or agency representing the commercial advertisers and any persons employed by such media company or agency. Where any such information is redacted, KENS shall advise Complainants Hance, Mattox, Mosbacher, Richards and Williams of the type of information deleted. Further redactions will be allowed only if the information redacted is proprietary and not relevant to resolution of the complaint. Should Complainants Hance, Mattox, Mosbacher, Richards and Williams serve documents upon KENS they may redact proprietary information and so advise KENS of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact. As with all discovery matters, the parties should make good faith attempts to resolve any discovery disputes before presenting such a dispute to the Bureau.

19. Any documents, answers to written interrogatories, or deposition transcripts, if any, produced during discovery, and the information revealed thereby, shall not be provided to any third party other than the Commission. Copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp.

20. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to Complainants Hance, Mattox, Mosbacher, Richards and Williams, the management of KENS, their attorneys and staffs, and expert witnesses. Either party may require the other to disclose in writing the names of staff and experts who have access to documents and written information. Each party must explain to all staff and experts that the documents, answers to written interrogatories, deposition transcripts, and their contents may not be disclosed to any entity other than the Commission.

21. None of the materials produced, nor the contents thereof, may be used for any purpose other than the prosecution of the instant complaint. Each individual who is provided access to these materials is hereby required to certify in writing that he or she has personally reviewed this order and understands the limitations imposed on the signing party. No copies of materials protected by this order may be made except copies to be used by the persons identified in paragraph 19. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided. Upon termination of this proceeding, including any appeals, petitions or settlement, all originals and reproductions of any protected materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the protected materials of an opposing party shall be destroyed.

22. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may warrant. Such agreement should be confirmed in writing and a copy provided to the Bureau. As noted in the *Declaratory Ruling*, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the complaint or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. §1.24.

23. Extensions of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or both parties submit declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

24. Within 30 days after completion of discovery, Complainants Hance, Mattox, Mosbacher, Richards and Williams must file an amended complaint, alleging specific facts based on the information discovered, stating the nature of the §315(b)(1) violation and the amounts said to be owed. After KENS has filed its answer, the parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution.

25. Settlement of lowest unit charge claims is strongly encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. *See Declaratory Ruling*, at 7521, n.52.

26. ACCORDINGLY, we find that a *prima facie* case of a violation of the Commission's lowest unit charge requirements has been established by Complainants Hance, Mattox and Williams in connection with advertising aired on KENS on their behalf during the 45 days before the March 13, 1990, primary. We also find that a *prima facie* case of a violation of the Commission's lowest unit charge requirements has been established by Complainant Mattox in connection with advertising aired on KENS on his behalf during the 45 days before the April 10, 1990, primary

[15] *See WTVT*, 8 FCC Rcd 714, 717 (MMB 1993) (*Further Discovery Order*). In this regard, we require the party seeking depositions to demonstrate with respect to *each* witness it seeks to depose, that the individual's testimony is necessary to the resolution of the issues upon which discovery has been granted herein. This must include "*specific*" arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence." *Id.*

run-off election. We also find that a *prima facie* case of a violation of the Commission's lowest unit charge requirements has been established by Complainants Mosbacher, Richards and Williams in connection with advertising aired on KENS on their behalf during the 60 days preceding the November 6, 1990, general election. The parties are hereby ORDERED to follow the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established herein.

27. We find that Complainants Luce, Phillips and Brown have failed to make a *prima facie* case of a violation of the lowest unit charge requirement. Thus, their complaints ARE DISMISSED. In addition, we find that all Complainants failed to establish a *prima facie* case with respect to allegations that KENS discriminated between candidates in advertising rates charged. Thus, those claims ARE DISMISSED as to all Complainants.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANTS HANCE, MATTOX, MOSBACHER, RICHARDS, AND WILLIAMS

Certain documents shall be produced to Complainants Hance, Mattox, Mosbacher, Richards and Williams by KENS by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060 in accordance with the procedures outlined in this Order.[16] The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of candidates for public office in connection with the 1990 primary and general elections.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the March 13, 1990, primary, April 10, 1990, primary run-off, and November 6, 1990, general elections.

3) Copies of invoices and contracts for, and program logs related to: all commercial time run on KENS beginning on January 27, 1990, and running through March 12, 1990 (the 45 days preceding the relevant primary election); all commercial time run on KENS beginning on February 24, 1990, and running through April 9, 1990 (the 45 days preceding the relevant primary run-off election); and all commercial time run on KENS beginning on September 7, 1990, and running through November 5, 1990 (the 60 days preceding the relevant general election).

This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired, and, if not apparent from the preceding, documents reflecting all agency discounts provided by the station;

b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during this period;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order;

d) All orders for commercial spots aired during this period, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during this period; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during this period.

4. All documents used by KENS to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of §315(b) of the Communications Act. This should include any written policy statement(s) used by KENS in 1990 which directly or indirectly related to KENS's pricing policies.

5. All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of KENS with respect to the 1990 primary and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by KENS in performing any such audit or providing any such rebates.

[16] We emphasize that pursuant to this Order discovery for Mattox shall be limited to the 45 days preceding the March 13, 1990, primary election and the April 10, 1990, primary run-off election, discovery for Hance shall be limited to the 45 days preceding the March 13, 1990, primary election, discovery for Richards and Mosbacher shall be limited to the 60 days preceding the November 6, 1990, general election, and discovery for Williams shall be limited to the 45 days preceding the March 13, 1990, primary election and the 60 days preceding the November 6, 1990, general election.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS HANCE, MATTOX, MOSBACHER, RICHARDS AND WILLIAMS

Answers to the following interrogatories shall be provided to Complainants Hance, Mattox, Mosbacher, Richards and Williams in accordance with the procedures set forth in this *Order:*

1) Describe how KENS arrived at its lowest unit charge ("LUC") in 1990.

2) Detail any actions taken by KENS to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1990 statutory LUC periods. This should include the identities of all individuals taking or participating in such action, identifying their position at KENS, and should identify all documents which refer to or formed a part of KENS's efforts to ensure that candidates received the LUC.

3) Provide a statement that indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time period.

4) Provide a statement that explains any codes used by KENS or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period (30 days after release of this *Order):* Day 1

Documents in Appendix A and Answers to Written Interrogatories in Appendix B due: Day 1

Request by Complainants Hance, Mattox, Mosbacher, Richards and Williams for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due: Day 15

Opposition by KENS to Complainants Hance, Mattox, Mosbacher, Richards and Williams request for further discovery due: Day 20

KENS's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due: Day 20

Opposition by Complainants Hance, Mattox, Mosbacher, Richards and Williams to KENS's request for discovery due: Day 27

Documents and answers to written interrogatories (if allowed by Bureau) pursuant to KENS's request for discovery due: Day 45

Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to Complainants Hance, Mattox, Mosbacher, Richards and Williams request for further discovery due: Day 60

Final day of discovery period: Day 60

Complainants Hance, Mattox, Mosbacher, Richards and Williams' amended complaint due: Day 90

KENS's answer to amended complaint due: Day 105

Joint notice of election of complaint resolution procedure due: Day 116

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

JOHN VAN DE KAMP,
DIANNE FEINSTEIN,
et al.

Against Station KCOP-TV
Los Angeles, California

ORDER

Adopted: June 21, 1995; Released: June 27, 1995

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed on July 15, 1993, on behalf of the following: John Van De Kamp, Dianne Feinstein, Pete Wilson, Marian Bergeson, Leo McCarthy, Joan Milke-Flores, Thomas Hayes, and Matthew Fong (hereinafter, collectively, "Complainants"). Complainants allege that television Station KCOP-TV, Los Angeles, California, overcharged them during the 1988 and/or 1990 elections in violation of the requirements of Section 315(b) of the Communications Act of 1934, as amended.[1] Complainants also allege that KCOP-TV engaged in rate discrimination between candidates, failed to disclose all discount rates and privileges available to the candidates, and failed to provide reasonable access by limiting the amount of available spots on the late news. All the Complainants were legally qualified candidates in the State of California.[2] The Bureau also has before it an answer to the complaint filed on September 10, 1993, by KCOP Television, Inc., licensee of Station KCOP-TV (hereinafter, "KCOP").

2. To establish a *prima facie* case, a complainant must, at a minimum, submit "a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511, 7513 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*). A complainant must describe the specific factual basis for its belief that a station has committed a violation, rather than, for example, merely making a general allegation that a station has overcharged candidates. See Lawton *Chiles, Bob Martinez, Bill Nelson, and Jim Smith(WTVT(TV))*, 7 FCC Rcd 6661, 6662-63 (MMB 1992), *modified*, 7 FCC Rcd 7199 (MMB 1992), review granted in part and denied in part, 8 FCC Rcd 131, 132 (1992)(*"WTVT"*).

3. We have analyzed the complaint pursuant to the guidelines set forth in the *Declaratory* Ruling. We find that Complainants Wilson and Feinstein have established a *prima facie* case of a violation by Station KCOP of the lowest unit charge ("LUC") requirement of Section 315(b)(1) of the Communications Act, as amended, by overcharges preceding the November 6, 1990, general election, but failed to establish a *prima facie* case of any of the other violations alleged. Complainants Van De Kamp, Bergeson, McCarthy, Milke-Flores, Hayes and Fong failed to establish a *prima facie* case of any of their allegations. Accordingly all allegations except the 1990 general election overcharge claims made by Wilson and Feinstein must be dismissed.[3] Following is a discussion of the Bureau's findings with respect to all the issues raised.

Overcharge Allegations

4. Complainants claim that one advertiser, the California Lottery ("Lottery"), paid less than candidates for spots aired during the lowest unit charge period. In support thereof, Complainants compare the amounts they paid for spots during the June 5, 1990, primary election LUC period and the November 6, 1990, LUC period, with the amounts paid by the Lottery during the same time periods. However, the complaint does not identify the class of the spots purchased by the Complainants or the Lottery, nor are contracts, invoices, or other documentation which contains such information provided.[4] The only documentation provided,

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[1] Section 315(b) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. Section 315(b).

[2] Van De Kamp was a candidate for nomination for Governor for the June 5, 1990, primary. Feinstein was a candidate for nomination and election for Governor for the 1990 primary and November 6, 1990, general election. Wilson was a candidate for nomination and election for Governor for the 1990 primary and general election, and he was also a candidate for nomination and election to the United States Senate for the June 7, 1988, primary and November 8, 1988, general election. Bergeson was a candidate for nomination and election for Lieutenant Governor for the 1990 primary and general election. McCarthy was a candidate for nomination and election for Lieutenant Governor for the 1990 primary and general election, and he was also a candidate for nomination and election to the United States Senate for the 1988 primary and general election. Milke-Flores was a candidate for nomination for Lieutenant Governor for the 1990 primary. Hayes was a candidate for nomination and election for Treasurer for the 1990 primary and general election. Fong was a candidate for nomination and election to the Board of Equalization for the 1990 primary and general election.

[3] McCarthy and Wilson were the only candidates alleging Section 315(b) violations during the statutory periods preceding the 1988 elections. Because we are dismissing McCarthy's complaint in its entirety, and Wilson's complaint with respect to charges in 1988, we need not reach the question of whether the complaint is untimely with respect to charges in 1988.

[4] Complainants also allege that although the lottery spots were preemptible spots, they were not preempted, and therefore automatically became the functional equivalent of fixed time. We disagree. Preemptible classes of time have associated risks of preemption, and it is that risk that characterizes the spot, not

copies of invoices for the Lottery spots and for spots purchased by Wilson and Feinstein in May, June, October, and November 1990, does not identify the class of the spots purchased.

5. Complainants have provided us with insufficient information to compare the spots purchased by them with the spots purchased by the Lottery. Accordingly, absent evidence that the Complainants and the Lottery purchased the same class of time, we must dismiss Complainants' allegations. *See KABC-TV*, 9 FCC Rcd at 1587; citing *(WTVT(TV)*, 7 FCC Rcd 6661, 6662-63 (MMB 1992), *modified*, 7 FCC Rcd 7199 (MMB 1992), review granted in part and denied in part, 8 FCC Rcd 131, 132 (1992).

6. The complaint also relies on generally-available industry or statistical data to show that KCOP overcharged candidates. Specifically, Complainants cite average station-specific rates based on cost per point projections employing Spot Quotations and Data, Inc. ("SQAD") for the second and fourth quarters of 1990. In opposition, KCOP puts forth its own SQAD calculations as a basis for comparison.[5]

7. KCOP argues that the complaint's SQAD figures are specifically unreliable because the computations are incorrectly based on Arbitron ratings for adults ages 25-54 multiplied by the SQAD cost per point ("CPP") averages for the 25+ age group, resulting in artificially low SQAD averages. In addition, KCOP states that the complaint is based on incorrect Arbitron ratings in a number of instances. KCOP avers that some of the Arbitron ratings used in the complaint's SQAD calculations are the wrong ratings for particular programs, such as "Star Trek: The Next Generation," listed as a 3 rating instead of the actual 8 rating. KCOP also states that for several of the weekday rotations (not specified), instead of using the Arbitron "weekday" rating as the appropriate rating to use for a weekday rotation, the complaint averages the five different weekday ratings for Monday through Friday, resulting in a lower SQAD figure than would have resulted had the correct rating been used.

8. With regard to its own SQAD calculations, KCOP notes that in many instances the SQAD rate is higher than the rate charged candidates. With respect to some of the remaining time periods, KCOP challenges SQAD's methodology as it applies to KCOP as an independent station. KCOP argues that the SQAD rates in certain time periods are artificially low because the actual ratings for certain prime-time first-run syndication programs in the fourth quarter of 1990 were actually higher than network-run programs. KCOP argues, therefore, that the prime-time SQAD CPP normally assigned to network affiliated stations should be applied to these time periods rather than the lower "late fringe" CPP normally assigned by SQAD to independent stations.

9. We agree that the complaint incorrectly calculates its SQAD figures by multiplying Arbitron ratings from one demographic group with CPP from a different demographic group. Therefore, the evidence they submitted does not support a finding of a *prima facie* case of overcharges. *See WTVT(TV)* 6661, 6662, n.8. However, KCOP's own SQAD analysis supports Wilson's and Feinstein's allegations of overcharges. Thus, we find that the SQAD data in this record supports a finding that a *prima facie* case of overcharges to Wilson and Feinstein in the 1990 general election has been made.

10. Using KCOP's figures, it appears that in a substantial number of instances, SQAD rates were lower than rates charged Wilson and Feinstein for the period preceding the November 6, 1990, general election. For that pre-election period, Wilson had 20 instances out of a total of 84 spots listed, covering 4 out of 10 listed time periods, in which the rates charged exceeded SQAD rates, and Feinstein had 30 instances out of 80 spots listed covering 5 out of 13 listed time periods, in which the rates charged exceeded the SQAD rate. Thus, we find that there exists a *prima facie* case of a LUC violation with respect to rates Wilson and Feinstein were charged for advertising during the period preceding the 1990 general election.

11. With respect to the period preceding the June 5, 1990, primary, KCOP's SQAD figures confirm only 4 out of 19 instances of rates alleged by Van de Kamp as exceeding the SQAD rate. We do not believe that this number is sufficient to show that the candidate was charged more than the SQAD rate in a substantial majority, or even in a substantial number of instances.[6] In addition, during the primary LUC period, Wilson had 4 sixty-second spots for which the complaint alleged he was overcharged based on SQAD. However, SQAD calculations are based on thirty second spots, and the complaint makes no showing that the station's sixty-second rates were double its thirty-second rates. Thus, we have no basis for comparison for these 4 spots, and find that Wilson has failed to establish a *prima facie* case of overcharges during the 45 days preceding the June 5, 1990 primary.

12. In addition, the complaint alleges that McCarthy and Wilson were overcharged for spots purchased during the 1988 primary and general election periods. However, although the complaint includes invoices for spots purchased by both complainants during 1988, those invoices are for spots purchased during the general election period, and not the primary. The complaint also fails to provide a rate card or any other evidence, such as commercial invoices or 1988 SCOOP or SQAD information with which to compare the rates charged. In addition, KCOP provides no information as to its rates in 1988. Accordingly, we must dismiss Complainants' bare allegations as to overcharges in 1988.

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whether the spot actually clears. Complainants have not presented evidence sufficient to persuade us that the likelihood of preemption for a particular time period was so low as to render the preemptible time sold during that time period the functional equivalent of fixed time.

[5] KCOP provides a chart which recalculates the SQAD rates with what it asserts to be the correct Arbitron ratings for adults ages 25-54, multiplied by the SQAD CPP for adults ages 25-54 for each time period for the second, third and fourth quarters of 1990, including alternate figures using the higher CPP based on Arbitron prime-time ratings for adults ages 25-54 for specific programs.

[6] *See WTVT*, 7 FCC Rcd at 6663. KCOP's SQAD analysis also shows that Hayes and Bergeson had no overcharges for either 1990 election period, that Feinstein had no overcharges during the primary, and that McCarthy had no overcharges during the general election. We note that the complaint fails to include any evidence that Milke-Flores or Fong purchased time on KCOP for either 1990 period, and that it makes no showing as to the 1990 primary for McCarthy. Accordingly, no comparison with KCOP's SQAD figures could be made.

13. With respect to KCOP's arguments challenging SQAD's calculation of CPP, we note that the Commission in the Declaratory Ruling specifically endorsed the use of generally available industry or statistical data on average rates to establish a *prima facie* case of an LUC violation. 6 FCC Rcd at 7521, n.47. KCOP's arguments regarding SQAD's use of Arbitron ratings for its CPP calculations are sufficiently similar to arguments we have addressed in other cases endorsing the use of data on average rates, *see KABC-TV*, 9 FCC Rcd at 1587; *WTVT(TV)*, 7 FCC Rcd at 6663, that they need not be addressed in the context of this case.

Alleged Rate Discrimination

14. The complaint alleges that KCOP discriminated in the advertising rates it charged different candidates, in violation of Section 73.1941(e) of the Commission's Rules. 47 C.F.R. Section 73.1941(e). Complainants cite several examples of different rates charged different candidates for advertising during the same day parts for both the 1988 and 1990 elections. However, the complaint does not indicate the length and class of the spots. KCOP responds that the difference in rates between the candidates is attributable to differences in the class of the spots. Clearly, if the spots are of different length or class, rate distinctions do not amount to discrimination. Because Complainants have not provided information as to length or class, they have failed to establish a *prima facie* case with respect to rate discrimination.

Failure to Disclose Intermediate Rates and Reasonable Access

15. The complaint also alleges that KCOP violated the Communications Act by utilizing a ratecard which contained two rates, fixed and immediately preemptible, and by failing to disclose to candidates the existence of intermediate rates. Citing to a letter dated December 12, 1991, from the Commission to Station WCAU-TV, Philadelphia, Pennsylvania, Complainants allege that KCOP was obligated to disclose all rates in existence, particularly intermediate preemptible rates, time sensitive make good policy, and other discount privileges. Complainants also allege that what KCOP did disclose was misleading and tended to steer them toward the higher priced, non-preemptible spots. In addition, Complainants allege that the station's restriction of time available on the late news to six spots, with only one per candidate, violated the reasonable access requirement and forced candidates to purchase fixed rate spots in order to avoid preemption.[7] In support of these arguments, Complainants include records of charges to the California Lottery which they claim show intermediate rates.

16. In response, KCOP states that the Lottery spots to which Complainants refer were for different classes of time or bonus spots for spots purchased at a higher price and, therefore, not comparable to the ads purchased by the candidates. In addition, KCOP states that its disclosure policy with respect to its political rate card was in full compliance with Commission policy at the time, and that the fixed rate card disclosed that "there may be lower rates in existence." KCOP denies that any candidates were "steered" to purchase higher priced non-preemptible time, and points out that all of the candidates except Van de Kamp purchased both preemptible and non-preemptible time. KCOP states that its practice of limiting political advertising during the late news was in full compliance with Commission policy pursuant to Section 312(a)(7) of the Communications Act.[8]

17. With respect to KCOP's duty to disclose intermediate rates, we find that Complainants have failed to establish a *prima facie* case. We note that the Commission had not articulated broadcasters' affirmative disclosure duties at the time these rate cards were issued. See WTVT-TV, 7 FCC Rcd 6661, 6664 n.17 (1992); Mass Media Bureau Report On Political Programming Audit, 68 RR2d 113 (1990). Furthermore, Complainants have not shown that they requested and were denied any rate information or the opportunity to purchase intermediate preemptible levels of time. They also have not shown that they were steered toward purchasing higher priced, non-preemptible time, since the information they furnished with the complaint shows that both preemptible and non-preemptible spots were purchased by Complainants. Finally, Complainants have not shown that KCOP's practice of limiting the amount of political advertising on the late news necessarily resulted in or constituted a denial of any federal candidates' reasonable access rights. *See CBS, Inc., v. FCC*, 953 U.S. 367 (1981).

Timetable and Procedures for Discovery

18. In the *Declaratory Ruling*, the Commission determined that, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery, subject to specific conditions established by the Bureau. *See Declaratory Ruling*, 6 FCC Rcd at 7513-14, 7521, n.49. *See also, WTVT*, 7 FCC Rcd at 6665. Accordingly, we will allow complainants Pete Wilson and Dianne Feinstein limited discovery on the issue of overcharges during the 60 days before the November 6, 1990, general election. The documents set forth in Appendix A to this *Order*, and answers to the written interrogatories set forth in Appendix B to this Order, must be served upon counsel for complainants Wilson and Feinstein (not the Commission) by KCOP on or before the first day of the discovery period, which will be 30 days after the release date of this Order. See Appendix C.

19. Any request for further discovery by complainants Wilson and Feinstein must contain a showing that such discovery is necessary to resolve the issue of overcharges. Any discovery request by KCOP for production of docu-

[7] In this connection, Complainants argue that the rates charged candidates for the 6 limited non-preemptible spots in the news should have been no greater than the preemptible rates charged commercial advertisers to clear during the same news program, especially since commercial advertisers were not subject to a limit on the number of spots they could purchase. We find no merit to this argument. The Commission does not require that non-preemptible political rates *in* the news be limited to preemptible commercial rates in the news.

[8] We note that neither Wilson nor Feinstein was a federal candidate in the 1990 election, and thus neither was entitled to reasonable access under Section 312(a)(7) of the Act, 47 U.S.C. §315(a)(7).

ments, answers to written interrogatories, or for the taking of depositions must demonstrate that the information requested is necessary for KCOP to respond to arguments or claims that could be made by complainants Wilson and Feinstein in their amended complaint. We emphasize that any request for depositions must also demonstrate that depositions are necessary to resolution of the issue of overcharges and include a list of the proposed deponents.[9] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible.

20. Documents produced by KCOP that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, the name(s) of any person employed by the advertiser, and the name of any media company or agency representing the commercial advertisers and any persons employed by such media company or agency. Where any such information is redacted, KCOP shall advise complainants Wilson and Feinstein of the type of information deleted. Further redactions will be allowed only if the information redacted is proprietary and not relevant to resolution of the complaint. Should complainants Wilson and Feinstein serve documents upon KCOP, they may redact proprietary information and so advise KCOP of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact. As with all discovery matters, the parties should make good faith attempts to resolve any discovery disputes before presenting such a dispute to the Bureau.

21. Any documents, answers to written interrogatories, or deposition transcripts, if any, produced during discovery, and the information revealed thereby, shall not be provided to any third party other than the Commission. Copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp.

22. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to complainants Wilson and Feinstein, the management of KCOP, their attorneys and staffs, and expert witnesses. Either party may require the other to disclose in writing the names of staff and experts who have access to documents and written information. Each party must explain to all staff and experts that the documents, answers to written interrogatories, deposition transcripts, and their contents may not be disclosed to any entity other than the Commission.

23. None of the materials produced, nor the contents thereof, may be used for any purpose other than the prosecution of the instant complaint. Each individual who is provided access to these materials is hereby required to certify in writing that he or she has personally reviewed this order and understands the limitations imposed on the signing party. No copies of materials protected by this order may be made except copies to be used by the persons identified in paragraph 22. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided. Upon termination of this proceeding, including any appeals, petitions or settlement, all originals and reproductions of any protected materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the protected materials of an opposing party shall be destroyed.

24. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may warrant. Such agreement should be confirmed in writing and a copy provided to the Bureau. As noted in the Declaratory Ruling, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the complaint or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. Section 1.24.

25. Extensions of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or both parties submit declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

26. Within 30 days after completion of discovery, complainants Wilson and Feinstein must file an amended complaint, alleging specific facts based on the information discovered, stating the nature of the Section 315(b)(1) violation and the amounts said to be owed. After KCOP has filed its answer, the parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution.

27. Settlement of lowest unit charge claims is strongly encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. See Declaratory Ruling at 7521, n.52.

28. ACCORDINGLY, we find that a prima facie case of a violation of the Commission's lowest unit charge requirement has been established by complainants Pete Wilson and Dianne Feinstein in connection with advertising aired on KCOP on their behalf during the 60 days before the November 6, 1990, general election. The parties are hereby ORDERED to follow the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established herein.

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[9] *See WTVT*, 8 FCC Rcd 714, 717 (MMB 1993)(*Further Discovery Order*). In this regard, we require the party seeking depositions to demonstrate with respect to *each* witness it seeks to depose, that the individual's testimony is necessary to the resolution of the issues upon which discovery has been granted herein. "This must include "*specific*" arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence." Id.

29. We find that a *prima facie* case with respect to a violation of the lowest unit charge requirement during the 60 days preceding the November 6, 1990, general election has not been established by complainants John Van De Kamp, Marian Bergeson, Leo McCarthy, Joan Milke-Flores, Thomas Hayes and Matthew Fong. Therefore, their complaint against KCOP is hereby DISMISSED. We find that all Complainants have failed to establish a prima facie case of a violation of the lowest unit charge requirement with regard to the 45-day period preceding the June 5, 1990, primary election. Accordingly, these claims are DISMISSED as to all complainants. We further find that a *prima facie* case of a violation of the Commission's lowest unit charge requirement has not been established by Complainants Leo McCarthy and Pete Wilson in connection with advertising aired on KCOP on their behalf during the 45 days preceding the June 7, 1988, primary, or the 60 daysh) preceding the November 8, 1988, general election. Accordingly, their claims are DISMISSED as to that time period. Finally, we find that Complainants failed to establish a prima facie case with respect to allegations that KCOP discriminated between candidates in the rates charged, allegations that KCOP did not disclose to candidates all discount privileges, or provide reasonable access to the news. Thus, these claims are DISMISSED as to all complainants.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANTS WILSON AND FEINSTEIN

Certain documents shall be produced to complainants Wilson and Feinstein by KCOP by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060 in accordance with the procedures outlined in this Order. The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of candidates for public office in connection with the 1990 general election.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the 1990 general election.

3) Copies of invoices and contracts for, and program logs related to, all commercial time run on KCOP beginning on September 7, 1990 and running through November 6, 1990 (the 60 days preceding the relevant general election). This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired, and, if not apparent from the preceding, documents reflecting all agency discounts provided by the station;

b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during this period;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order;

d) All orders for commercial spots aired during this period, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during this period; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during this period.

4. All documents used by KCOP to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of Section 315(b) of the Communications Act. This should include any written policy statement(s) used by KCOP in 1990 which directly or indirectly related to KCOP's pricing policies.

5. All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of KCOP with respect to the 1990 primary election, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by KCOP in performing any such audit or providing any such rebates.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS WILSON AND FEINSTEIN

Answers to the following interrogatories shall be provided to complainants Wilson and Feinstein in accordance with the procedures set forth in this Order:

1) Describe how KCOP arrived at its lowest unit charge ("LUC") in 1990.

2) Detail any actions taken by KCOP to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1990 statutory LUC periods. This should include the identities of all individuals taking or participating in

such action, identifying their position at KCOP, and should identify all documents which refer to or formed a part of KCOP's efforts to ensure that candidates received the LUC.

3) Provide a statement that indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time period.

4) Provide a statement that explains any codes used by KCOP or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period (30 days after release of this *Order):*	Day 1
Documents in Appendix A and Answers to Written Interrogatories in Appendix B due:	Day 1
Request by complainants Wilson and Feinstein for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due:	Day 15
Opposition by KCOP to complainants Wilson and Feinstein's request for further discovery due:	Day 20
KCOP's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due:	Day 20
Opposition by complainants Wilson and Feinstein to KCOP's request for discovery due:	Day 27
Documents and answers to written interrogatories (if allowed by Bureau) pursuant to KCOP's request for discovery due:	Day 45
Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to complainants Wilson and Feinstein's request for further discovery due:	Day 60
Final day of discovery period:	Day 60
Complainants Wilson and Feinstein's amended complaint due:	Day 90
KCOP's answer to amended complaint due:	Day 105
Joint notice of election of complaint resolution procedure due:	Day 116

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-255

In the Matter of

Amendment of Section 73.202(b), RM-7781
Table of Allotments,
FM Broadcast Stations.
(Nowata and Collinsville, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 19, 1995; Released: June 27, 1995

By the Chief, Allocations Branch:

1. At the request of BSB Communications ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5178 (1991), proposing the substitution of Channel 268C3 for Channel 268A, the reallotment of Channel 268C3 from Nowata to Collinsville, Oklahoma, as its first local aural transmission service, and the modification of Station KQSY's construction permit to specify Collinsville as its community of license. Comments were filed by the petitioner and John M. Singer ("Singer"). Reply comments were filed by the petitioner, Singer and KBGH Radio Group ("KBGH").[1]

2. Petitioner reiterates its intention to apply for Channel 268C3, if allotted to Collinsville. In addition, it appends supporting comments from the Mayor of Collinsville and the present and past presidents of the Collinsville Chamber of Commerce.

3. Singer, permittee of Station KBXT-FM, Bixby, Oklahoma, argues that the petition should be denied. It states that Station KQSY does not need to relocate to Collinsville in order to operate on Channel 268C3 and the deletion of Channel 268A from Nowata would, in reality, leave the community without any local service. Although Station KRIG(FM) is licensed to Nowata, Singer states that the station has been granted special temporary authority to be off-the-air until September 27, 1991, and according to Commission records, has not requested an extension of its STA. Thus, he believes it reasonable to assume that Station KRIG(FM) does not intend to resume operation.[2] Further, Singer contends that the proposed relocation of Station KQSY is really an attempt to serve the Tulsa Urbanized Area rather than Collinsville itself, which he states is located on the "very edge" of the Urbanized Area. According to Singer, 58% of the Tulsa Urbanized Area would lie within Station KQSY's 1 mV/m contour and the population residing within the Urbanized Area would account for approximately 70% of the station's population gain. He goes on to state that the petitioner has not provided any information demonstrating that the residents of Collinsville want a local radio station and questions whether the petitioner, on its own, would have such knowledge since the licensee of Station KQSY is not a resident of either Nowata or Collinsville, but rather Abilene, Texas. Finally, Singer argues that Nowata should retain Channel 268A since the community is growing at a faster rate than Collinsville, Collinsville is already well served by the Tulsa area stations and Collinsville would receive a "strong" aural signal from a Nowata Channel 268C3 station.

4. In reply comments, Singer again argues that the deletion of Channel 268A from Nowata would result in the removal of the community's sole local transmission service since Station KRIG(FM) has not stated its intention to return to on-air service. Further, it contends that implicit in the petitioner's application for Nowata was an intention to serve the community which Singer states is now being abandoned for no reason other than the financial gain that would result from relocating into or near an Urbanized Area. Singer also points out that the licensees of Stations KRIG(FM) and KQSY are both based in Abilene, Texas. From this fact he argues that there is "strong circumstantial evidence that these two entities are plotting and planning together." Therefore, he urges the Commission to view the representations of Station KRIG(FM) regarding resumption of operation with "great caution" so as to avoid the manipulation of Commission rules and, indeed, believes that further Commission inquiry into the "Abilene Connection" is warranted.

5. In response, petitioner agrees that Channel 268C3 could be allotted to Nowata because of the modification of Station KIND(FM) at Independence, Kansas, from Channel 269A to Channel 275A.[3] However, he points out that Station KIND(FM) is still operating on Channel 269A and no application has been filed for the new channel. Therefore, petitioner states that until such time as Station KIND(FM) begins operating on Channel 275A, Channel 268C3 is inoperable at Nowata. Petitioner also characterizes as idle speculation and surmise Singer's statements that Station KQSY seeks to serve the Tulsa Urbanized Area rather than Collinsville, noting that no evidence has been presented to support the contention. While Singer states that Collinsville

[1] KBGH, permittee of Station KRIG(FM) (formerly KNFB(FM)), Nowata, Oklahoma, submitted initial comments supporting the rule making after the date for filing such responses but prior to the date for filing reply comments. KBGH also filed timely reply comments reiterating its support for the reallotment of Channel 268C3 to Collinsville. Since the late-filed initial comments do not provide any information not also provided in its timely reply comments, we will only discuss the reply comments. After the record closed, petitioner filed supplemental comments concerning the off-the-air status of Station KRIG(FM). Singer filed comments in response and petitioner filed a motion to strike the Singer responsive comments. The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods set forth in the *Notice of Proposed Rule Making*. Further, in this case, the status of Station KRIG(FM) is no longer an issue since the station returned to the air on May 4, 1993, and thus the unauthorized comments are moot.

[2] Station KRIG(FM) resumed on-air operation in May 1993.

[3] Station KIND(FM)'s license was modified from Channel 269A to Channel 275A to permit Station KVOE-FM, Emporia, Kansas, to upgrade its operation from Channel 269A to Channel 269C2. *See* 5 FCC Rcd 7385 (1990).

is on the "very edge" of the Urbanized Area, petitioner submits that according to the 1980 U.S. Census map of the Tulsa Urbanized Area, Collinsville is not only not on the edge of the Urbanized Area but not shown on the map at all. Petitioner also disputes Singer's assertion that Nowata should retain its two local aural transmission services because the community is growing at a faster rate than Collinsville. Rather, petitioner states that between 1960 and 1990 Nowata's population decreased by 6.8% while the population of Collinsville increased by 42.7%. Petitioner also states that the residents of Collinsville are in favor of a local radio station as shown by the proffered letters from a number of Collinsville civic leaders. Finally, petitioner submits that Singer's opposition is not based on the public interest but instead is an attempt to "frustrate" what he believes to be competition for the Tulsa market.

6. KBGH supports petitioner's request to reallocate Channel 268C3 to Collinsville. It states that Nowata, with a 1990 population of less than 4,000 persons, cannot support two local stations.

DISCUSSION

7. After careful review of the pleadings before us, we believe the public interest would be served by substituting Channel 268C3 for Channel 268A and reallotting the channel from Nowata to Collinsville since it could enable Collinsville to receive its first local aural transmission service and permit Station KQSY to provide service to an additional 467,489 persons. As proposed, we will also modify Station KQSY's construction permit to specify Channel 268C3 at Collinsville. Collinsville has a 1990 U.S. Census population of 3,556 persons, which represents a gain of 1.35% between 1980 and 1990. Nowata, on the other hand, has declined in population 8.8% between 1980 and 1990, according to the U.S. Census Bureau. Collinsville is governed by a mayor and four commissioners, and has its own police and fire departments, water, electric, trash, sewer and ambulance service, as well as numerous local businesses. Collinsville is not located in the Tulsa Urbanized Area, instead being 20 kilometers (12.4 miles) from the outer edge. Further, while Singer argues that Collinsville is located near the outer limits of the Urbanized Area and Station KQSY's 60 dBu signal would cover 58% of the Urbanized Area, the Commission has declined to extend the same concerns about the presumption of a first local service preference where a station seeks to move from a rural community to one within an Urbanized Area to those stations seeking to move from one rural community to another rural community, albeit closer to the Urbanized Area. *See Pinetops and Scotland Neck, North Carolina*, 7 FCC Rcd 5113 (1992) and *Van Wert, Ohio and Monroeville, Indiana*, 7 FCC Rcd 6519 (1992) (will not presume that a community outside of, but near, an Urbanized Area is not entitled to a first local transmission service preference). In this case, we find that Singer has not presented any evidence that would lead us to believe that Collinsville is not entitled to a first local transmission service preference. We specifically conclude that a 60 dBu signal coverage of 58% of the Tulsa Urbanized Area is not sufficient, given the lack of any other evidence, to warrant further analysis of the factors set out in *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988). Finally, we note that while Station KQSY's 60 dBu signal, as a Collinsville Class C3 station, may cover 58% of the Tulsa Urbanized Area, 88.6% of the increased service area lies outside of the Urbanized Area.

8. A staff engineering study has determined that the allotment of Channel 268C3 to Collinsville will enable Station KQSY to provide service to an additional 467,489 persons within a 2,363 square kilometer area. This gain in population is offset by the fact that the relocation of Channel 268C3 will also result in a loss of service to 5,883 persons within a 697 square kilometer area. However, while we carefully consider any proposal that would result in a loss of existing reception service, we believe the public interest is well served by this reallotment proposal, given the large reception service gains and the relatively small reception service losses that would result. *See Eatonton, Georgia, et al.*, 8 FCC Rcd 4938 (1993). Further, the vast majority of the population (5,656 persons) affected by the change in community will remain well served with at least five reception services and no population will receive less than four services.

9. As pointed out by Singer, Channel 268C3 can be allotted to Nowata in compliance with the Commission's minimum distance separation requirements because of the modification of Station KIND(FM)'s license from Channel 269A to Channel 275A at Independence, Kansas. However, even if the petitioner agreed to the allotment of Channel 268C3 to Nowata instead of Collinsville, it would not be possible for Station KQSY to effectuate the upgrade at this time since Station KIND(FM) has not yet changed frequency. Therefore, we believe that since the substitution of Channel 268C3 for Channel 268A at Nowata, and the channel's reallotment to Collinsville, will provide Collinsville with its first local aural transmission service, will not result in the creation of a loss area where the population receives less than five aural services, with the exception of the extremely small population (227 persons) who will receive four services, and will enable Station KQSY to upgrade its facilities without the delay which would be occasioned by the necessary move of Station KIND(FM) to Channel 275A, the public interest will be served by granting petitioner's request. Finally, as to Singer's request that the Commission investigate the "Abilene Connection" to determine if they have attempted to manipulate the Commission's Rules, we find that Singer's speculative allegations do not constitute evidence sufficient to warrant an investigation.

TECHNICAL SUMMARY

10. Channel 268C3 can be allotted to Collinsville in compliance with the Commission's minimum distance separation requirements with a site restriction 1.8 kilometers (1.1 miles) east to accommodate petitioner's desired transmitter site and to avoid short-spacings to Station KXOJ-FM, Channel 265A, Sapulpa, Oklahoma, and Station KEOK, Channel 269C3, Tahlequah, Oklahoma.[4]

[4] The coordinates for Channel 268C3 at Collinsville, Oklahoma, are North Latitude 36-21-50 and West Longitude 95-49-16.

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 11, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Collinsville, Oklahoma	268C3
Nowata, Oklahoma	232A

12. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of BSB Communications, for Station KQSY, IS MODIFIED to specify operation on Channel 268C3, in lieu of Channel 268A, and to specify Collinsville, Oklahoma, in lieu of Nowata, Oklahoma, as its community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

13. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, BSB Communications, permittee of Station KQSY, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Leslie K. Shapiro or Stanley Schmulewitz (engineering issues), Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 27, 1995

ANCHORAGE TELEPHONE UTILITY FILES ITS PROPOSED COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On June 14, 1995, the Municipality of Anchorage d/b/a Anchorage Telephone Utility ("ATU") filed its initial cost allocation manual ("CAM") for the separation of regulated and nonregulated costs. ATU files this CAM because it exceeded $100 million in operating revenues for the year ending December 31, 1994. Interested parties may file comments on the proposed CAM by **July 28, 1995**. Replies should be filed by **August 14, 1995**. Comments should reference AAD 95-91. A copy of each pleading should be sent to Debbie Weber, FCC, Common Carrier Bureau, Room 812, 2000 L St., N.W., Washington D.C. 20554. A copy should also be sent to the International Transcription Service ("ITS"), 2100 M St., N.W., Suite 140, Washington D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Debbie Weber at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Carlos J. Lastra, Trustee
(Assignor)

and File No. BALCT- 940105KG

AERCO Broadcasting
Corporation of Puerto Rico
(Assignee)

For Assignment of License of Station
WRWR-TV, San Juan, Puerto Rico.

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1995; Released: June 27, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned application to assign the license of television station WRWR-TV, Channel 30, San Juan, Puerto Rico from Carlos J. Lastra, Trustee for Bay Broadcasting Corporation, Inc. to AERCO Broadcasting Corporation of Puerto Rico. The proposed assignee is the licensee of AM radio stations WQBS in San Juan, Puerto Rico and WFAB in Ceiba, Puerto Rico. Because WRWR-TV's Grade A contour encompasses the communities of license of WQBS and WFAB, the proposed acquisition of station WRWR-TV would be inconsistent with Section 73.3555(c) of the Commission's Rules (the "one-to-a-market" rule), which prohibits the common ownership of television and radio stations in the same market. However, the applicants in this case have requested waiver of the rule pursuant to the "failed station" exception set forth in Note 7 of that rule. The assignment application and waiver request are unopposed.

2. In 1989, the Commission established standards for reviewing requests for waiver of the "one-to-a-market" rule. It adopted a policy under which it looks favorably upon waiver requests involving (1) station combinations in the top 25 markets where 30 or more independent broadcast voices remain after the proposed transaction; and (2) combinations involving "failed stations." *See Amendment of Section 73.3555*, 4 FCC Rcd 1741, *reconsidered in part*, 4 FCC Rcd 6489 (1989). Broadcast stations that have not been operated for a substantial period of time (four months or more), or that are involved in bankruptcy proceedings are considered "failed" within the meaning of the "failed station" criterion. *See* 47 C.F.R. Section 73.3555, Note 7.

3. WRWR-TV has been involved in bankruptcy proceedings for eight years. The station originally filed for protection under 11 U.S.C. Chapter 11 on March 13, 1987 and was converted to the current proceeding under 11 U.S.C. Chapter 7 on March 9, 1990. In addition, our records show that WRWR-TV has been off the air since August 21, 1992, due to financial difficulties. For these reasons, we conclude that the applicants have demonstrated that WRWR-TV meets the Commission's critierion for a "failed station." *See Great Alaska Electric Radio Co., Inc.*, 5 FCC Rcd 2935 (1990); and *KEZB, Inc., Debtor*, 7 FCC Rcd 3209 (1992).

4. In view of the foregoing, we find that the applicants in this case have met the necessary standard to receive a waiver under the "failed station" criterion. Having determined that the applicants are qualified in all other aspects, we further find that a grant of the application, subject to the following conditions, would serve the public interest.

5. Accordingly, IT IS ORDERED, That the application (BALCT-940105KG) for consent to assign the license of station WRWR-TV, San Juan, Puerto Rico from Carlos J. Lastra, Trustee to AERCO Broadcasting Corporation of Puerto Rico, IS GRANTED, subject to the following conditions:

(a) That the assignment of license covered by BALCT-940105KG be consummated within sixty (60) days of the date of the grant, that the Commission be notified of such consummation within one day thereafter and that the station resume broadcasting within sixty (60) days after consummation of the grant of the application; and

(b) That ten days prior to the commencement of regular programming operation, the assignee submit certification that equipment performance measurements were made in accordance with Section 73.1590 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this Memorandum Opinion and Order to the applicants by Certified Mail -- Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-87

In the Matter of

Amendment of Section 73.202(b), RM-8644
Table of Allotments,
FM Broadcast Stations.
(Hatfield, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 8, 1995; Released: June 27, 1995

Comment Date: August 18, 1995
Reply Comment Date: September 4, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by John Harle ("petitioner") requesting the allotment of FM Channel 281C2 to Hatfield, Arkansas, as that community's first local aural transmission service. Petitioner stated his intention to apply for Channel 281C2 if allotted to Hatfield, as requested.[1]

2. A staff review of the proposal reveals that Channel 281C2 can be allotted to Hatfield in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 3.9 kilometers (2.4 miles) northwest of the community at coordinates 34-31-04 and 94-23-46. The site restriction is required to avoid a short-spacing to the licensed site of Station KHSP-FM, Channel 280A, Ashdown, Arkansas, at coordinates 33-36-06 and 94-04-38.

3. In view of the petitioner's stated interest in providing a first local aural transmission service to Hatfield, Arkansas, we will propose to allot Channel 281C2 to that community, as requested. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Hatfield, Arkansas, as follows:

	Channel No.	
City	Present	Proposed
Hatfield, Arkansas	--	281C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 18, 1995**, and reply comments on or before **September 4, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

John Harle
951 Redan
Houston, TX 77009

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Although the petitioner's request was signed, he failed to include an affidavit verifying that the statements contained in the petition are accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in his comments.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GENERAL COMMUNICATION INC.,
Complainant,

v. File No. E-91-085

ALASCOM, INC.,
Defendant.

ORDER

Adopted: June 7, 1995; Released: June 27, 1995

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. General Communication, Inc., (GCI) filed the above-captioned formal complaint against Alascom, Inc. (Alascom), alleging that Alascom violated Sections 201(b), 202(a), and 203(c) of the Communications Act of 1934, as amended (Act), 47 U.S.C. §§ 201(b), 202(a), and 203(c), and certain Commission orders by offering illegal rebates to potential customers as an inducement to presubscribe to Alascom's interexchange services. Alascom filed an answer denying the allegations, and a cross complaint alleging that GCI was providing interstate telecommunications services without a tariff covering its rates, charges and practices in violation of Section 203 of the Act. On May 19, 1995, GCI and Alascom filed a joint motion to dismiss with prejudice the complaint and cross complaint.

2. We are satisfied that granting the joint motion will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, and authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed on March 22, 1991, by General Communication, Inc. IS DISMISSED with prejudice.

4. IT IS FURTHER ORDERED that the cross complaint filed on May 15, 1991, by Alascom, Inc. IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 90-119

In the Matter of

Florida Public Safety Plan

ORDER

Adopted: June 19, 1995; Released: June 27, 1995

By the Deputy Chief, Office of Engineering and Technology and the Chief, Private Wireless Division, Wireless Telecommunications Bureau:

1. By letter dated July 28, 1994, Region 9 (Florida) proposed to amend the Region 9 Public Safety Radio Plan that was accepted under delegated authority, by the Commission on November 8, 1989, 4 FCC Rcd 8352 (1989). The proposed amendment would revise the current channel allotments.

2. On October 28, 1994, the Commission placed the proposed amendment on Public Notice. No comments were received concerning the proposed amendment to the Region 9 Plan.

3. We have reviewed the proposed amendment to the Region 9 Plan and, having received no comments to the contrary, conclude it furthers the interest of the eligible Public Safety entities within the Region.

4. Accordingly, IT IS ORDERED, THAT the Public Safety Radio Plan for Region 9 IS AMENDED, as set forth in the Region's letter of July 28, 1994. This Amendment is effective immediately.

5. For further information, contact Deborah A. Behlin at (202) 418-0680.

FEDERAL COMMUNICATIONS COMMISSION

Bruce A. Franca
Deputy Chief, Office of
Engineering and Technology

Robert H. McNamara
Chief, Private Wireless Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Cablevision of Indianapolis
Benchmark Filing to Support
Cable Programming Service Price

CUID No. IN0302
(Indianapolis)

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1995; Released: June 28, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Louisiana, Inc.	CUID No. LA0022 (Lake Charles)
TCI Cablevision of Maryland, Inc.	CUID No. MD0127 (Allegany)
TCI Cablevision of Greater Michigan, Inc.	CUID No. MI0166 (St. Ignace)
TCI of Southern Minnesota, Inc.	CUID No. MN0057 (Austin)
TCI Cablevision of Northwestern Ohio, Inc.	CUID Nos. OH0331 (Coldwater), OH0364 (St. Henry) and OH0932 (Celina)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1995; Released: June 28, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. For the franchise area designated as CUID No. MN0057, the Operator's actual CPS tier price was below its calculated maximum permitted price. For each of the other franchise areas in this Order, Operators' actual CPS tier prices were above the maximum permitted prices that they calculated for the CPS tier and, thus, Operators failed to demonstrate that their prices for the CPS tier were not unreasonable. Furthermore, upon review of Operators' submissions, we have found that in every case they miscalculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in their Form 393s:

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[12] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[13] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[14] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analyses, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operators have included on Schedule B and their Schedule B Analyses entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[15] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $0.02 to $8.58. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[16] Not only are Operators' reported labor costs for the service and maintenance of remotes and converters substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of their Form 393s.[17] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[18]

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[19] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators' Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[20] We have further determined that in order to

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[12] 47 U.S.C. § 543(b)(3).

[13] 47 C.F.R. § 76.923(b).

[14] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[15] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[16] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95 160, at ¶ ¶19 -20 (Cab. Serv. Bur., released Feb. 7, 1995).

[17] Operators' calculated hourly service charge in these communities ranges from $15.83 to $31.89.

[18] If, as in other communities, Operators are charging a wire maintenance fee we would expect to see these costs reflected in Operators' rate justification filings. The absence of these costs would provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by this error.

[19] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[20] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

yield an unbundling figure of $0.060 per subscriber per channel, Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301. While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. On its Form 393 filing for CUID Nos. OH0331, OH0364 and OH0932, the Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of March 1994. However, the Operator cannot permissibly calculate inflation through the end of March 1994. Based on the service date of the earliest valid complaint, the Operator was required to file a rate justification no later than November 15, 1993.[21] If the Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[22] The Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that the Operator should have filed Form 393.[23] On July 29, 1994, the U.S Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operator should have used injustifying its rate, of 1.030.

f. Because the other Operators also have failed to demonstrate that their prices for the CPS tier were not unreasonable, we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which each Operator filed.[24] On their amended Form 393s, Operators calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operators used in justifying their rates, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[25]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[26] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[27]

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[21] *See* 47 C.F.R. § 76.956(a).

[22] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[23] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[24] *Id.*

[25] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[26] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[27] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
LA0022	10/26/93	10/21/93
MD0127	10/29/93	10/19/93
MI0166	10/12/93	10/4/93
MN0057	11/15/93	11/9/93
OH0331	10/18/93	10/14/93
OH0364	10/18/93	10/14/93
OH0932	10/16/93	10/14/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
LA0022	$11.71	$11.08
MD0127	$13.26	$11.68
MI0166	$11.02	$10.07
MN0057	$10.84	$10.45
OH0331	$11.69	$10.89
OH0364	$11.69	$10.89
OH0932	$11.69	$10.89

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Illinois Valley, Inc. CUID Nos. IL0083 (Peru), IL0084 (Spring Valley) and IL0183 (La Salle)

TCI Cablevision of Nevada, Inc. CUID Nos. NV0004 (Carson City) and NV0019 (Washoe)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1995; Released: June 28, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. Operators assert that their monthly CPS tier prices are justified by their benchmark filings because their prices are lower than or equal to the maximum permitted charges as calculated in the filings. Upon review of Operators' Form 393 filings, we have found that they have not correctly calculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in Form 393:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[12] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[13] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] .47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] 47 U.S.C. § 543(b)(3).

[13] 47 C.F.R. § 76.923(b).

equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[14] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analyses, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operators have included on Schedule B and their Schedule B Analyses entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[15] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $8.11 to $16.50. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[16] Not only are Operators' reported labor costs for the service and maintenance of remotes and converters substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of their Form 393s.[17] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[18]

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[19] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators' Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[20] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301.[21] While we recognize that this

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[14] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[15] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[16] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19 -20 (Cab. Serv. Bur., released Feb. 7, 1995).

[17] Operators' calculated hourly service charge in these communities ranges from $20.07 to $25.99.

[18] If, as in other communities, Operators are charging a wire maintenance fee, we would expect to see these costs reflected in Operators' rate justification filings. The absence of these costs would provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by this error.

[19] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[20] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

[21] This adjustment to Worksheet 1 has the effect of causing Operators in some franchise areas to calculate their permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet

is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. Because the Operator for the franchise areas designated by CUID Nos. NV0004 and NV0019 has failed to demonstrate that its prices for the CPS tier were not unreasonable, we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operator filed.[22] On its amended Form 393s, the Operator calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date the Operator used in justifying its rates, of 1.034.

f. Because the Operator for the franchise areas designated by CUID Nos. IL0083, IL0084 and IL0183 has failed to demonstrate that its price for the CPS tier was not unreasonable, we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operator filed.[23] On its amended Form 393, the Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operator used in justifying its rate, of 1.030.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[24] However, we further determine that for CUID Nos. NV0004 and NV0019, the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order refunds in these franchise areas.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B, except for CUID Nos. NV0004 and NV0019, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area as set forth on Appendix A)[25] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that, except for CUID Nos. NV0004 and NV0019, Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communitiesx listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[26]

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

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1. In those franchise areas where Operators did not file a Worksheet 2 and one is needed, we have computed Worksheet 2 by using data supplied by Operators on their Form 1200 filings.

[22] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[23] *Id.*

[24] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[25] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[26] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
IL0083	10/19/93	10/6/93
IL0084	11/22/93	11/19/93
IL0183	10/18/93	10/12/93
NV0004	1/6/94	1/2/94
NV0019	1/5/94	12/30/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
IL0083	$9.49	$9.18
IL0084	$9.49	$9.18
IL0183	$9.49	$9.18
NV0004	$11.29	$11.21
NV0019	$11.26	$11.22

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Artist Enterprises	CUID Nos. CA0260 (Tuolumne County) and CA0261 (Sonora)
TCI of Kansas, Inc.	CUID No. KS0071 (Hutchinson)
TCI Cablevision of Texas, Inc.	CUID No. TX0291 (Lockhart)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1995; Released: June 28, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. Operators' actual CPS tier prices were above the maximum permitted prices that they calculated for the CPS tier and, thus, Operators failed to demonstrate that their prices for the CPS tier were not unreasonable. Furthermore, upon review of Operators' submissions, we have found that in every case they miscalculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in their Form 393s:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[12] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[13] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] 47 U.S.C. § 543(b)(3).

[13] 47 C.F.R. § 76.923(b).

equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[14] When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III, Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analyses, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off-premises by a third party. Operators have included on Schedule B and their Schedule B Analyses entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[15] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $0.00 to $12.05. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and converters.[16] Not only are Operators' reported labor costs for the service and maintenance of remotes and converters substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of their Form 393s.[17] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[18]

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[19] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators' Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[20] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301. While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum

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[14] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[15] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[16] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19-20 (Cab. Serv. Bur., released Feb. 7, 1995).

[17] Operators' calculated hourly service charge in these communities ranges from $14.69 to $18.71.

[18] If, as in other communities, Operators are charging a wire maintenance fee, we would expect to see these costs reflected in Operators' rate justification filings. The absence of these costs would provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by this error.

[19] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[20] *Cf.* United Video Cablevision, Inc., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

permitted CPS rate; it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. On its Form 393 filing for CUID Nos. CA0260 and CA0261, the Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of March 1994. However, the Operator cannot permissibly calculate inflation through the end of March 1994. Based on the service date of the earliest valid complaint, the Operator was required to file a rate justification no later than November 15, 1993. If the Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to calculate the inflation adjustment only through October 1993.[21] The Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that the Operator should have filed Form 393.[22] On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date the Operator should have used in justifying its rate, of 1.030.

f. Because the Operators for the franchise areas designated by CUID Nos. KS0071 and TX0291 have failed to demonstrate that their prices for the CPS tier were not unreasonable, we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which each Operator filed.[23] On their amended Form 393s, the Operators calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date the Operators used in justifying their rates, of 1.034.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[24]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[25] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[26]

11. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[21] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[22] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[23] *Id.*

[24] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[25] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[26] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
CA0260	9/13/93	9/6/93
CA0261	10/12/93	9/17/93
KS0071	2/7/94	1/17/94
TX0291	2/18/94	2/15/94

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
CA0260	$14.35	$12.01
CA0261	$14.35	$12.01
KS0071	$11.73	$11.10
TX0291	$11.14	$10.62

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Mishawaka, Inc. CUID No. IN0077 (South Bend)

TCI of Pennsylvania, Inc. CUID No. PA1584 (Kennedy)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1995; Released: June 28, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (individually "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings.[11]

5. For the franchise area designated by CUID No. IN0077, the Operator's actual CPS tier price was above the maximum permitted price that it calculated for the CPS tier and, thus, the Operator failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review of the Operator's submission for this franchise area, we have found that the Operator miscalculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to the Operator's calculations in its Form 393:

> On its Form 393 for CUID No. IN0077, the Operator calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of December 1994. However, the Operator cannot permissibly calculate inflation through the end of December 1994. Based on the service date of the earliest valid complaint, the Operator was required to file a rate justification no later than December 2, 1993.[12] If the Operator had filed FCC Form 393 by that date, the instructions to Form 393 would have required it to

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operators have sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operators implemented their CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *See* 47 C.F.R. § 76.956(a).

calculate the inflation adjustment only through November 1993.[13] The Operator cannot claim an additional inflation adjustment simply because it filed Form 393 late. We therefore must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that the Operator should have filed Form 393.[14] On July 29, 1994, the U.S Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PIfigures. we calculate an Inflation Adjustment Factor through November 1993, the base date the Operator should have used in justifying its rate, of 1.032.

6. For the franchise area designated by CUID No. PA1584, we have found no apparent errors in the Operator's calculation of its maximum permitted rate. However, the Operator's actual CPS tier price was above the maximum permitted price that the Operator calculated for the CPS tier. Accordingly, the Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, and we therefore must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which the Operator filed:[15]

On its amended Form 393, the Operator calculated the Inflation Adjustment Factor as of the end of December 1993 using data released on December 1, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through December 1993, the base date the Operator used in justifying its rate, of 1.034.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[16] However, we further determine that for CUID No. PA1584, the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund in this franchise area.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B, except for CUID No. PA1584, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[17] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

10. IT IS FURTHER ORDERED that, except for CUID No. PA1584, Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

11. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[18]

12. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[13] FCC Form 393, page 11, instructions for Line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii)(if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of the analysis).

[15] *Id.*

[16] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[18] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
IN0077	11/5/93	11/2/93
PA1584	1/10/94	1/5/94

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
IN0077	$11.20	$10.82
PA1584	$11.42	$11.31

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bresnan	CUID Nos. MI0101 (Bay City)
Communications	MI0102 (Essexville)
Company	MI0118 (Hampton)
Benchmark Filings To Support	MI0122 (Midland)
Cable Programming Service Prices	

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1995; Released: June 28, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on Operator and received by the Commission on the dates set forth on Appendix A. Operator attempted to justify its CPS prices through substantially identical FCC Forms 393 filed on November 15, 1993 for CUID Nos. MI0101, MI0102, and MI0122 and on January 6, 1995 for CUID No. MI0118. For CUID Nos. MI0101, MI0102, and MI0122, Operator amended its justifications on February 7, 1995, in response to a Cable Services Bureau Public Notice offering operators the opportunity to make optional supplemental filings.[11] For CUID No. MI0118, Operator filed additional information on February 24, 1995, in response to an inquiry by Commission staff.

5. On April 29, 1994, the local franchise authority and sole complainant for the community of Midland, CUID No. MI0122, filed with the Commission a Motion to Accept information regarding the CPS rates of Operator. In its motion, the complainant states that two of the channels on Operator's CPS tier duplicated the programming offered on two other channels and argued that Operator should not be permitted to count the duplicate channels twice under the benchmark formula. On May 31, 1994, Operator filed with the Commission a Supplement to its Rate Complaint Response for the community of Midland. In its Supplement, Operator defends its inclusion of the duplicate channels by stating, among other things, that it offered the duplicate channels with the local franchise authority's assent in order to accommodate customer equipment constraints and local programming interests. By letter dated April 20, 1995, the Commission requested further information from Operator concerning its duplicate channel counting for CUID Nos. MI0101, MI0102, MI0118, and MI0122. In response, Operator filed a letter with the Com-

[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Public Notice: Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 (Dec. 29, 1994) and Public Notice: Cable Services Bureau Announces Extension of Time to File Under Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 95-87 (Jan. 20, 1995) (together, *Public Notice*).

mission on April 26, 1995 stating that it currently did not have much of the information requested by the Commission and defending its practice of counting duplicate channels. In response, the complainant, the local franchise authority, filed a letter with the Commission on May 9, 1995 repeating its request that the Commission disallow Operator's duplicate channel counting and refuting many of Operator's claims.[12]

6. In its filings of May 31, 1994 and April 26, 1995, Operator argues that, assuming duplicate channels may not ordinarily be counted twice in calculating the benchmark, it should nonetheless be allowed to count its duplicate channels under the special circumstances of this case.[13] Specifically, Operator states that it offered duplicate programming on Channels 19 and 21 in order to accommodate subscribers whose television sets could not receive Channels 40 through 42 without a converter box. Operator states that Channels 19 and 21 were not normally used due to potential interference problems, but their use was deemed suitable for this purpose. Operator further states that the local franchise authority in the community of Midland approved this resolution of the problem. We are not persuaded by Operator's argument. Operator does not assert that it was required by any federal, state, or local authority to offer any of the duplicate channels, and no subscriber receives any separate benefit from Operator's offering both Channels 19 and 21 and Channels 40 to 42. Nor does Operator assert that the number of subscribers required to obtain converter boxes in order to receive Channels 40 through 42 will be material. We therefore will not include duplicate channels in the total number of either rate-regulated or satellite channels.[14]

7. Operator asserts that its monthly CPS tier prices are justified by its benchmark filings because its prices are lower than the maximum permitted charges as calculated in the filings. Upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and therefore it is appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Columns A, B and C of Worksheet 1 of Part II of its FCC Forms 393, Operator completed information for three separate tiers although its rate cards showed only two tier offerings consisting of basic and CPS programming with related charges. Accordingly, Worksheet 1 was adjusted to reflect only the two tiers and to include tier channels and tier charge information consistent with the rate cards.

b. Operator's Form 393, Worksheet 1, Line 104 entries do not represent its monthly equipment revenue current as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment cost figures it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entries.[15] However, Operator's entries on Line 104 differed substantially from its entries on Line 34. We therefore adjusted Line 104 to equal the amounts entered on Line 34.

c. Operator's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) count channels 19 and 21 as rate-regulated channels on the CPS tier. Both channel 19 and channel 42, however, carry identical programming shown at the same time. Because subscribers receive only one programming service over channels 19 and 42, Operator cannot charge subscribers for these channels as separate units of cable service.[16] Similarly, Operator counted channel 21 as a rate-regulated channel on the CPS tier even though channel 21 carries programming already shown on channels 40 and 41. [17] We therefore reduced the number of CPS channels from 24 to 22 on Form 393, Part I and on Part II, Worksheet 1, Line 102. We also reduced the number of rate-regulated channels used in calculating Operator's benchmark (Form 393, Part II, Worksheet 1, Line 121) from 44 to 42, and we reduced the number of satellite channels used in calculating the benchmark from 24 to 22.

8. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showings justify the maximum reasonable CPS tier prices shown on Appen-

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[12] Letter from Patrick A. Miles, Jr., attorney for the city of Midland, to FCC staff (May 3, 1995). (Local franchise authority did not request Operator "to provide duplicate programming" or "to charge subscribers twice for the same service.").

[13] Operator also argues that disallowing it to count its duplicate channels twice would constitute impermissible regulation on the basis of content. We reject this argument. The principle that identical programming may not be counted as two channels is not content-based because it applies without regard to the content of the duplicate programming. *See* Warner Cable Communications of Cincinnati, Inc. v. City of Cincinnati, Appeal of Local Rate Order, DA 95-550 at n.15 (Cab. Serv. Bur., released Mar. 21, 1995) (*"Cincinnati"*).

[14] This ruling is consistent with our decision in Cincinnati. In that case, we held that it could be unreasonable for a local franchising authority to prevent an operator from counting a duplicate channel on the basic tier where the operator was required to offer the programming in one channel position under the Commission's must-carry rules, 47 C.F.R. §§ 76.56 - 76.70, and it offered the same programming in another position to facilitate subscribers' taping of programs on their VCRs. Unlike *Cincinnati*, this case does not implicate the must-carry rules or any other government requirement to offer any of the duplicate channels. *See id.* at para. 8 and n.14.

[15] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[16] *See* Cox Cable Hampton Roads, Inc., Virginia Beach, Virginia, CUID No. VA0166, DA 94-1288, para. 6e (Cab. Serv. Bur., released Nov. 18, 1994).

[17] Channel 21 carries VH-1 programming from 4:00 AM to 4:00 PM and Comedy Central programming from 4:00 PM to 4:00 AM. These programming services are already shown continuously on channels 41 and 40, which carry VH-1 and Comedy Central programming, respectively.

dix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[18]

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the franchise areas referenced in the caption and at Appendix A herein ARE GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise areas shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[19] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

11. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the franchise areas listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[20]

13. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

14. IT IS FURTHER ORDERED, pursuant to Section 76.960 of the Commission's Rules, 47 C.F.R. § 76.960, that Operator shall not be required to obtain advance approval of adjustments to its CPS prices for CUID Nos. MI0101, MI0102, and MI0122 for one year following the release of this Order, due to Operator's having submitted in good faith optional supplemental filings in response to our *Public Notice*.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
MI0101	10/13/93	10/10/93
MI0102	10/8/93	10/4/93
MI0118	1/10/94	1/10/94
MI0122	10/12/93	10/10/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
MI0101	$11.49	$11.01
MI0102	$11.44	$10.96
MI0118	$11.44	$10.96
MI0122	$11.47	$10.98

[18] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[19] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[20] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jones Intercable, Inc.

IL0525 (Libertyville)
IL0526 (Mundelein)
IL0528 (Grayslake)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1995; Released: June 28, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tiers in the communities designated above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed andP served on Operator and received by the Commission on the dates set forth on Appendix A. Operator filed FCC Form 393 in response; Operator has also filed amended Form 393 filings, most recently on June 6, 1994.[11]

5. Operator asserts that for CUID No. IL0525, its monthly CPS tier price is justified by its benchmark filing because its price is lower than or equal to the maximum permitted charge as calculated in the filing. Operator admits that for CUID Nos. IL0526 and IL0528, its monthly CPS tier prices are above the maximum permitted charges as calculated in its filings; thus, for CUID Nos. IL0526 and IL0528, Operator has failed to demonstrate that its rates are not unreasonable. Furthermore, upon review of Operator's Form 393 filings, we have found that it has not correctly calculated its maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (*i.e.*, a "C" corporation). However, Operator incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. The Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (*i.e.*, calculate the tax as a percentage of return on invest-

[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*Second Order on Reconsideration*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operator's prices for the period after May 14, 1994 may be required to reflect the fact that Operator's prices during the earlier period, which are used as the starting point to calculate its prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

ment plus tax).[12] By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS prices. We therefore recalculated Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Operator's Form 393, Worksheet 1, Line 104 entries do not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment cost figures it entered on Line 34 of Step G of Part III should have been close or identical to its Line 104 entries.[13] However, Operator's entries on Line 104 differed substantially from its entries on Line 34. We therefore adjusted Line 104 to equal the amounts entered on Line 34.

c. Because Operator has failed to demonstrate that its prices for the CPS tiers were not unreasonable, we will set prices for these tiers. In doing so, we must recalculate the Inflation Adjustment Factor on the basis of the most accurate date currently available for the date Operator filed Form 393 for each franchise area.[14] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993, the base date Operator used in justifying its rate for CUID No. IL0528, and 1.030 as the Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates for CUID Nos. IL0525 and IL0526.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rates it was charging during the periods in question. Operator's showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[15]

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service prices charged by Operator in the areas referenced in the caption and at Appendix A herein ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the communities shown in Appendix B that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[16] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charges per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[17]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n.92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation."). *See also* Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.").

[13] *See* Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number as on Line 301.").

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

[17] We reserve the right to make further adjustments to Operator's prices for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filings.

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
IL0525	11/08/93	10/29/93
IL0526	12/27/93	12/22/93
IL0528	02/28/94	02/24/94

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
IL0525	$10.97	$10.49
IL0526	$10.91	$10.77
IL0528	$10.97	$10.47

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Systems Westchester Corp. — CUID No. NY0638 (Yonkers)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 1995; Released: June 28, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lafayette Cable TV — CUID No. LA0033 (City of Lafayette)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 1995; Released: June 28, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pocono CATV, Inc. CUID No. PA1114
(White Haven Borough)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 1995; Released: June 28, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

DIANNE FEINSTEIN,
JOHN SEYMOUR, THOMAS HAYES,
et al.

Against Station KCAL-TV
Los Angeles, California

ORDER

Adopted: June 21, 1995; Released: June 30, 1995

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it: (a) a complaint filed June 11, 1993, on behalf of the following: John Van De Kamp, Diane Feinstein, Pete Wilson, Marian Bergeson, Leo McCarthy, Joan Milke-Flores, John Seymour, Dan Lungren, Arlo Smith, Thomas Hayes, John Garamendi, and Matthew Fong (hereinafter, collectively, "Complainants") against Fidelity Television, Inc., licensee of KCAL (TV), Los Angeles, California (hereinafter "KCAL"); (b) an answer and motion to dismiss, filed August 13, 1993, by KCAL;[1] (c) a Request for Leave to Supplement Complaint filed September 14, 1993, on behalf of Complainants; and (d) an Opposition to and Motion to Strike Complainants' Request to Supplement Complaint dated September 23, 1993 by KCAL. Complainants were legally qualified candidates during the 1990 elections for various public offices in California.[2]

2. Regarding the Complainants' Request to Supplement their complaint, the Commission has stated that ". . . pleadings other than the complaint and answer to the complaint will not be accepted unless the party filing the additional pleading has demonstrated that the information presented is new and vital to the resolution of the complaint, and could not have been included in the original complaint because the facts were previously unknown or unavailable to the complainant, and could not have been discovered through reasonable efforts." *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith (WTVT(TV))*, 7 FCC Rcd 6661, n.3 (MMB), *modified*, 7 FCC Rcd 7199 (MMB), *rev. granted in part and denied in part*, 8 FCC Rcd 131, (1992) ("WTVT"). Absent any persuasive discovery of new evidence we would not accept the supplement to the complaint. However, the supplement responds to information which was allegedly unavailable to the Complainants at the time of the filing of the Complaint. Specifically, the supplement responds to information in the Answer and Motion to Dismiss concerning KCAL's asserted LUC for each class and rotation of spots purchased by the candidates. Therefore, we agree the supplement presents new information and the Request for Leave to Supplement Complaint will be granted. Consequently, the Opposition to and Motion to Strike Complainants' Request tohSupplement Complaint is denied. Furthermore, KCAL asks to be given additional time to respond to the Complainants' allegations in the Request for Leave to Supplement Complaint if it is so accepted. KCAL had the opportunity to respond in its opposition to and motion to strike Complainants' request to supplement complaint. Therefore, no additional time will be given for another response.

3. Complainants allege that KCAL systematically overcharged them during the 1990 primary and general elections, in violation of the lowest unit charge ("LUC") requirements of § 315(b) of the Communications Act of 1934, as amended.[3] Complainants also allege that KCAL engaged in rate discrimination, in violation of § 73.1941(e)

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[1] With the consent of Complainants' counsel, the due date for the answer and motion to dismiss was extended to August 13, 1993 and therefore timely filed.

[2] Van De Kamp was a legally qualified candidate for nomination for Governor of the State of California for the 1990 primary election; Feinstein was a legally qualified candidate for nomination and election for Governor of the State of California for the June 5, 1990, primary and November 6, 1990, general election; Wilson was a legally qualified candidate for nomination and election for Governor of the State of California for the 1990 primary and general election; Bergeson was a legally qualified candidate for nomination and election for Lieutenant Governor of the State of California for the 1990 primary and general election; McCarthy was a legally qualified candidate for nomination and election for Lieutenant Governor of the State of California for the 1990 primary and general election; Milke-Flores and Seymour were legally qualified candidates for nomination for Lieutenant Governor of the State of California for the 1990 primary election; Lungren and Smith were legally qualified candidates for nomination and election for Attorney General of the State of California for the 1990 primary and general election; Hayes was a legally qualified candidate for nomination and election for Treasurer of the State of California for the 1990 primary and general election; Garamendi was a legally qualified candidate for nomination and election for Insurance Commissioner of the State of California for the 1990 primary and general election; and Fong was a legally qualified candidate for nomination and election to the Board of Equalization for the State of California for the 1990 primary and general election. The 1988 campaigns of Pete Wilson and Leo McCarthy were originally a part of the proceeding, but they were withdrawn as part of the complaint. See Request for Leave to Supplement Complaint, dated September 13, 1993, n.1. Accordingly, allegations and responses to allegations concerning the 1988 campaigns of Pete Wilson and Leo McCarthy are not considered.

[3] Section 315(b) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

of the Commission's Rules,[4] and violated the comparable rate provision of § 315(b)(2) of the Communications Act of 1934, as amended.

4. Applying the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*), to the information presented, we find that Complainants have failed to establish a *prima facie* case for a lowest unit charge ("LUC"), rate discrimination, or comparable rate violations. To establish a *prima facie* case, a complainant must, at a minimum, submit a "short plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513. Complainants have failed to meet this burden and, accordingly, their claims against Station KCAL are hereby dismissed. Following is a discussion of the Bureau's findings with respect to the specific issues raised by Complainants.

TIMELINESS OF COMPLAINANTS' ACTION

5. KCAL argues that the complaint is untimely in that it was filed more than three years after the 1990 election. In support, KCAL asserts that the Commission has tacitly recognized the two-year political retention file period as the outside limit for the submission of complaints alleging violations of the LUC requirements. KCAL argues that because stations are required to maintain political files for two years, *See* 47 C.F.R. § 73.1943(c), and because it was held in *WTVT*, 7 FCC Rcd 6661, n.4, that the complaint was timely when it was filed within the two-year period after the 1990 elections, it must follow that a complaint filed after the two-year period is "necessarily untimely." The station also relies on the Commission's statement in the Declaratory Ruling that Complainants should bring LUC complaints in a timely manner to avoid resolution of a complaint based on a "stale" record. *Declaratory Ruling*, 6 FCC Rcd at 7521 n.46.

6. We are not persuaded to dismiss the case as untimely. Contrary to KCAL's assertion, the Commission has not "implicitly" recognized a two-year statute of limitations for LUC complaints. Our reference to the two-year retention period in *WTVT* only recognized that documents pertaining to candidate purchases were still available in the file. Neither the two-year political file retention period nor our statement in *WTVT* means that the statute of limitations period for LUC cases should be limited to two years. To the contrary, as stated in *WTVT*, "[o]ur rules do not prescribe or limit the time during which an LUC complaint must be filed." *WTVT*, 7 FCC Rcd 6661, n.4. Indeed, we have entertained complaints filed more than two years after elections. *KBMT*, 9 FCC Rcd 6051 (MMB 1994). Further, KCAL has not persuaded us that equitable considerations warrant dismissal of the complaint as untimely. It does not assert that, in fact, it has destroyed, in the regular course of business, the commercial records necessary to resolve this complaint. In addition, even if records are not discoverable, the likelihood is that the Complainants, rather than the licensee, will be harmed.

I. Overcharge Allegations

Comparison to Generally-Available Statistical Data

7. The Complainants use generally-available statistical data to show that they were overcharged by Station KCAL. In the instant case, Complainants allege that using cost per point Spot Quotations and Data, Inc. ("SQAD") data indicate that KCAL overcharged candidates Feinstein, Fong, Garamendi, Hayes, Smith, Van De Kamp, and Wilson by an estimate of $122,299 for the 1990 LUC periods.[5] Additionally, invoices but no SQAD analysis were presented for Bergeson and McCarthy. No SQAD analysis or invoices or any other evidence is provided for complainants Milke-Flores, Seymour, and Lungren; therefore, their overcharge claims against KCAL must be dismissed.

8. The Complainants that provided invoices and/or a SQAD analysis assert that they multiplied the average rate for a given daypart in the Los Angeles market by the actual, station-specific ratings on KCAL. The data used in the SQAD analysis were derived from documents obtained from the Spot Quotations and Data, Inc. and the Arbitron Company. However, it appears from the information provided that the SQAD demographic group used was 25-54, while the Arbitron demographic group used for KCAL was 25+. See *Lawton Chiles, Bob Martinez, Bill Nelson and Jim Smith (WCPX-TV)*, 10 FCC Rcd. 940 (MMB 1995).

9. It is important for the Commission to be able to verify that the same category of statistical and rating data is utilized. As recognized by Complainants in an earlier proceeding, failure to utilize the same category for each type of data in an LUC analysis will result in incorrect findings.[6] As a result, we are unable to accept the SQAD data as presented by Complainants, and all claims relying on the SQAD evidence must be dismissed.[7]

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[4] Section 73.1941(e) (formerly § 73.1940(c)), states in pertinent part:

(e) Discrimination between candidates. In making time available to candidates for public office, no licensee shall make any discrimination for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subjects any such candidate to any prejudice or disadvantage. . .

[5] KCAL argues that, because Complainants have provided no affidavits in support of their allegations, this complaint should be rejected. While the complaint includes declaration by Complainants' counsel, we agree that those declarations are not based on personal knowledge of the facts. As we stated in *WTVT*, 7 FCC Rcd 6662, at n.6, it is our preference that candidates verify their complaints. In the absence of a specific Commission requirement for such a statement, however, we will not dismiss a complaint on these grounds.

[6] For example, in an affidavit submitted by Ms. Leslie Edelstein in KABC-TV, 9 FCC Rcd. 1586 (MMB 1994), Edelstein recognized that the calculations using statistical data for an Adult 25+ demographic group and an Arbitron rating for household demographics would result in an erroneous conclusion. Thus, in that case, Edelstein withdrew her calculations which were based on such a mis-matched analysis. See Request for Leave to Supplement Complaint, dated March 4, 1993, filed on behalf of Dianne Feinstein, John Seymour, Thomas Hayes, et al., against Station KABC-TV.

[7] KCAL's arguments against the use of SQAD will not be addressed for we have found the Complainants' SQAD methodology to be flawed.

Comparison to Charges for California Lottery Spots

10. Complainants further allege that records regarding commercial advertising indicate that KCAL overcharged candidates. Cited as examples are spots sold to the California Lottery, a commercial advertiser, between May and November 1990, compared to costs for spots sold in the same day parts to complainants Van De Kamp, Feinstein, Wilson, and Hayes. Complainants append 1990 invoices for the California Lottery as a way of indicating that political advertisers paid more than the California Lottery. There is, however, no documentation or assertion as to the classes of time purchased by the Lottery during the same time period. Under these circumstances, we lack sufficient information to determine whether the Complainants have shown, *prima facie*, that they were overcharged for the "same class and amount of time for the same time period" as required by Section 315 of the Act. Furthermore, KCAL's answer asserts that the difference in costs is attributable to differences in class, periods or rotations of time, and/or spots of different length in violation of Section 315(b).

Rate Discrimination Allegation

11. Complainants allege that KCAL engaged in rate discrimination between and among candidates, in violation of the LUC requirement § 315(b), 47 U.S.C. § 315(b)(2),[8] and § 73.1941(e) of the Commission's Rules. Complainants allege that KCAL charged different rates to different candidates for political advertisements in the same daypart. Complainants do not indicate the class of time of the candidates' spots and further state that because class is not indicated on the invoices, class cannot be used as a basis for discrimination. However, as station KCAL asserts, this argument is illogical. The invoices' silence as to class of time purchased does not mean that the station did not sell different classes of time. Further, KCAL asserts that the difference in rates between the candidates is attributable to differences in the class, rotation, and/or periods of time of the spots. The nondiscrimination provision of § 73.1941(e) and § 315 apply only to spots purchased in the same class and amount of time in the same time period. If the spots are of different class, length, and time period, rate distinctions do not amount to discrimination. Because complainants have not provided information as to class, rotation, and periods of time, they have failed to establish a *prima facie* case with respect to LUC, rate discrimination, and comparable use violation.

Rebate Allegations

12. In its Answer, KCAL sought to refute Complainants' allegations by listing each of the approximately 1100 spots purchased by candidates during the relevant election periods and identifying the class of time, the rotation purchased, and the LUC for each spot. In Exhibit R-1 in their Request for Leave to Supplement Complaint, Complainants allege sixty-six overcharges compiled from KCAL's Answer.

13. Of the sixty-six alleged overcharges, fifty-two appear to be invalid because the compared spots are of different rotations.[9] We believe that the remaining fourteen apparent overcharges are *de minimus*, given the total number of spots purchased by Complainants.[10] These overcharges are not sufficient to establish a *prima facie* case, thereby triggering our procedures for comprehensive discovery.[11]

14. However, fourteen of the charges listed in Exhibit R-1 appear to warrant rebates. Therefore, we hereby Order KCAL to review the following list of apparent overcharges and issue rebates accordingly:

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[8] This provision governs charges for political advertising during the period outside of the forty-five days preceding a primary and the sixty days preceding a general election. Specifically, the Act requires stations to charge a candidate no more than the rate charged other advertisers for a comparable use.

[9] Complainants argue that the rate charge by KCAL should get lower for each successfully longer rotation under KCAL offers, *e.g.*, if the rate for a single day is $10.00, the rate for a three-day rotation should be $5.00. By way of this argument, Complainants' seek to reduce the price of several rotations listed by KCAL in its Answer. However, Janet Schoff's Declaration in the Answer states that, "[i]n general, a longer rotation has a lower advertising rate (all other factors being equal) because it gives KCAL more flexibility in determining when to air a particular spot. . . However, different rotations may also have different values based on the particular programs that air on a given day, audience size and market conditions." In light of the station's response that there may be other factors, other than length, involved in the cost of a rotation, we do not accept Complainants' arguments.

[10] In footnote 2 of their Supplement, Complainants' argue that KCAL offered multiple levels of both fixed and preemptible time, contrary to Commission policy at the time. Indeed, in the Declaration by Janet Schoff, attached to KCAL's Answer, the station appears to state that KCAL offered multiple levels of preemptible time. Since Complainants fail to provide any example of being charged different preemptible rates for the same class and length of time in the same time period, and since the Commission has reconsidered its position on muliple levels of preemptible time, we do not find that the practice gives rise to a *prima facie* violation of our rules. See *Codification of the Commission's Political programming Policies*, 7 FCC Rcd 678 (1991); *recon. denied*, 7 FCC Rcd 4611 (1992); see also, *KBMT*, 9 FCC Rcd 6051 (MMB 1994). With regard to the argument that KCAL offered multiple levels of non-preemptible time, it appears that the Declaration stated only that different codes were assigned to political vs. commercial advertisers, and that the different codes did not reflect different classes of time. Additionally, it appears that candidates were permitted to purchase all classes of time on the station.

[11] Out of approximately 514 spots purchased by Wilson, there appears to be five overcharges. Of the 46 spots purchased by Smith, there appears to be two overcharges, of the approximate 253 spots purchased by Feinstein, there appears to be six overcharges, and of the approximate sixty-two spots purchased by Van De Kamp, there appears to be one overcharge.

Candidate	Date	Length	Time	Rate	Class	Rotation	Rate	LUC	LUC	Rebate
Wilson	05/08	60	1100-1200	400	5	T-F	400	300		
Wilson	05/11	60	1100-1200	400	5	T-F	400	300		
Wilson	05/11	60	1100-1200	400	5	T-F	400	400	300	100
Wilson	05/11	60	1100-1200	300	5	T-F	300	300		
Van de Kamp	05/30		1400-1500	1100	1	W-F	1100	1100		
Van de Kamp	06/01		1400-1500	1700	1	W-F	1700	1700	1100	600
Wilson	06/02	15	1500-1600s	600	4	SA-SU	600	600		
Wilson	06/03	15	1500-1600u	975	4	SA-SU	975	975	600	375
Feinstein	10/24		1800-2100	7000	10	LA	7000	7000	4550	2450
Feinstein	10/24		1800-2100	7000	10	LA	7000	4550		
Wilson	10/26		2100-2200	1350	11	F	1350	900	750	150
Feinstein	10/26		2100-2200	1350	11	F	1350	1350	750	600
Smith	10/26		2100-2200	1350	11	F	1350	750		
Feinstein	10/26		2100-2200	1350	11	F	1350	1350	750	600
Smith	10/26		2200-2300	1350	11	F	1350	750		
Feinstein	10/26		2200-2300	1350	11	F	1350	1350	750	600
Feinstein	10/26		2200-2300	1350	11	F	1350	1350	750	600
Wilson	10/26		2200-2300	1350	11	F	1350	900	750	150
Wilson	10/24		2200-2300	1500	11	W	1500	900		
Smith	10/24		2200-2300	1500	11	W	1500	1350	900	450
Feinstein	10/31		1930-2000	4500	9	M-F	4500	3800		
Feinstein	11/02		1930-2000	4500	9	M-F	4500	3800		
Feinstein	10/30		1930-2000	4500	9	M-F	4500	3800		
Feinstein	10/30		1930-2000	4500	9	M-F	4500	3800		
Feinstein	10/29		1930-2000	4500	9	M-F	4500	4500	3800	700
Feinstein	11/01		1930-2000	4500	9	M-F	4500	3800		
Smith	11/05		1930-2000	2800	9	M	2800	2800		
Garamendi	11/05		1930-2000	4100	9	M	4100	2800		
Feinstein	11/05		1930-2000	4500	9	M	4500	2800		
Feinstein	11/05		1930-2000	4500	9	M	4500	2800		
Smith	11/05		1930-2000	4500	9	M	4500	4500	2800	1700

Candidate	Date	Time	Rotation	Rate Section	Net Price Paid	Add'l Rebate
Wilson	10/11	8:19 p.m.	8-9 p.m. (T-F)	10	$1100	$100
Wilson	10/12	9:00 p.m.	8-9 p.m. (T-F)	10	$1000	

CONCLUSION

15. ACCORDINGLY, we find that Complainants have failed to make a *prima facie* case of violation of any obligation arising under Section 315(b), rate discrimination, or the comparable use provision. KCAL is, however, hereby ORDERED, within 30 days of the date of this letter, to advise the Commission of all rebates necessitated in accordance with this Order. Therefore, the complaint against Station KCAL is hereby DISMISSED, and the relief requested is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-96

In the Matter of

Amendment of Section 73.202(b), RM-8645
Table of Allotments,
FM Broadcast Stations.
(Lakeview, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 12, 1995; Released: June 29, 1995

Comment Date: August 21, 1995
Reply Comment Date: September 5, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Dale Hendrix ("petitioner") requesting the allotment of FM Channel 228C3 to Lakeview, Arkansas, as that community's first local aural transmission service. Petitioner stated his intention to apply for Channel 228C3 if allotted to Lakeview, as requested.

2. A staff analysis of the proposal reveals that Channel 228C3 can be allotted to Lakeview, Arkansas, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is sited at least 6.7 kilometers (4.1 miles) north of the community at coordinates 36-25-27 and 92-34-25. The site restriction is required to avoid a short-spacing to the site specified in the construction permit issued to Station KZLE(FM) for Channel 226C, Batesville, Arkansas, at coordinates 35-53-27 and 91-44-01.

3. In view of the petitioner's stated interest in providing a first local aural transmission service to Lakeview, Arkansas, we will propose to allot Channel 228C3 to that community. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Lakeview, Arkansas, as follows:

	Channel No.	
City	Present	Proposed
Lakeview, Arkansas	–	228C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 21, 1995**, and reply comments on or before **September 5, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William J. Pennington, III, Esq.
5519 Rockingham Road-East
Greensboro, NC 27407

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules. IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be ex-

pected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-97

In the Matter of

Amendment of Section 73.606(b), RM-8651
Table of Allotments,
TV Broadcast Stations.
(Tazewell, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 13, 1995; Released: June 29, 1995

Comment Date: August 21, 1995
Reply Comment Date: September 5, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by James F. Stair, II ("petitioner"), requesting the allotment of UHF TV Channel 48 to Tazewell, Tennessee, as the community's first local commercial television service.[1]

2. Tazewell (population 2150) is the county seat of Claiborne County and is located in northeastern Tennessee approximately 56 kilometers (35 miles) northeast of Knoxville, Tennessee.[2] Channel 48 can be allotted to Tazewell with a plus offset[3] in compliance with the Commissions minimum distance separation requirements with a site restriction of 1.9 kilometers (1.2 miles) west to accommodate petitioner's desired site.[4] In order to accommodate petitioner's request, we also propose to change the offset designations for Channel 48 at Greenwood, South Carolina, and Channel 48 at Columbus, Georgia. Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Tazewell is not affected.[5]

3. We believe the public interest would be served by proposing the allotment of Channel 48 to Tazewell, Tennessee, since it could provide the community with its first local TV service. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments. Section 73.606(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No. Present	Proposed
Tazewell, Tennessee	–	48+
Columbus, Georgia	3, 9+, *28, 38+, *48, 54+	3, 9+, *28, 38+, *48+, 54+
Greenwood, South Carolina	*38, 48+	*38, 48

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is requ ired by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 21, 1995**, and reply comments on or before **September 5, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James F. Stair, II
2424 Bainbridge Way
Powell, Tennessee 37849
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be

[1] Petitioner failed to state that he will apply for Channel 48, if allotted, and should correct this deficiency in response to the this *Notice*. *See* paragraph 2 of the attached appendix.

[2] Population figures are taken from the 1990 U.S. Census.

[3] "A station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin*, 3 FCC Rcd 6765 n.1 (1988).

[4] The coordinates for Channel 48+ at Tazewell are North Latitude 36-27-32 and West Longitude 83-35-07.

[5] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed Reg. 28346, published July 29, 1987.

served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-101

In the Matter of

Amendment of Section 73.202(b), RM-8646
Table of Allotments,
FM Broadcast Stations.
(Viola, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 14, 1995; Released: June 29, 1995

Comment Date: August 21, 1995
Reply Comment Date: September 5, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Fulton County Broadcasters ("petitioner") seeking the allotment of FM Channel 232C3 to Viola, Arkansas, as that community's first local aural transmission service. Petitioner stated its intention to apply for Channel 232C3 if it is ultimately allotted to Viola.

2. A staff engineering review of the proposal has determined that Channel 232C3 can be allotted to Viola in conformity with the minimum distance separation requirements of Section 73.207(b)((1) of the Commission's Rules, provided the transmitter therefor is located at least 9.2 kilometers (5.7 miles) south of the community at coordinates 36-19-00 and 91-57-00. The site restriction is necessary to avoid a short-spacing to the licensed site of Station KSPQ(FM), Channel 230C1, West Plains, Missouri, at coordinates 37-00-12 and 91-54-24, as well as to the reference coordinates specified for Channel 232C2, Rogers, Arkansas, at 36-24-00 and 93-55-30.

3. In light of the interest expressed by the petitioner in providing a first local aural transmission service to Viola, Arkansas, we will propose to allot Channel 232C3 to that community, as requested. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Viola, Arkansas, as follows:

	Channel No.	
City	Present	Proposed
Viola, Arkansas	–	232C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 21, 1995**, and reply comments on or before **September 5, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William J. Pennington, III, Esq.
5519 Rockingham Road-East
Greensboro, NC 27407

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-47

In the Matter of

Amendment of Section 73.202(b)	RM-8188
Table of Allotments,	RM-8243
FM Broadcast Stations.	
(Latta, Marion, Camden and	
Blythewood, South Carolina)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 16, 1995; Released: June 29, 1995

By the Chief, Allocations Branch:

1. At the request of Winfas of Belhaven, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 2095 (1993), requesting the substitution of Channel 232C3 for Channel 232A at Marion, South Carolina, the reallotment of Channel 232C3 from Marion to Latta, South Carolina, as the community's first local aural transmission service, and the modification of Station WCMG(FM)'s license accordingly (RM-8188).[2] To accommodate the Latta allotment, petitioner proposes the substitution of Channel 274A for Channel 232A at Camden, South Carolina, and modification of Station WPUB-FM's license accordingly. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted to Latta. Joseph Adams Ranke ("Ranke") filed comments and a counterproposal proposing the allotment of Channel 232A at Blythewood, South Carolina as the community's first local aural transmission service (RM-8243).[3] Reply comments were filed by petitioner.[4] Ranke filed untimely responsive comments and a supplement. Petitioner filed a motion to strike and contingent reply to the supplement. An objection was filed by Ranke. Petitioner filed a consolidated reply to the objection.

[1] The community of Blythewood, South Carolina, has been added to the caption.

[2] Assignment of the license for Station WCMG(FM) from Winfas of Belhaven, Inc., to Winfas of Virginia, Inc. (File No. BALH-931227GE), was granted on December 30, 1993 and consummated on December 31, 1993.

[3] The counterproposal was placed on Public Notice on May 25, 1993, Report No. 1942. Although the counterproposal was put on Public Notice, in retrospect, it should not have been because the counterproposal failed to include an affidavit verifying that the statements contained in it were accurate to the best of the counterproponent's knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposals must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). After the reply comment period for the counterproposal, Ranke filed supplemental pleadings to correct the omission and to respond to allegations made by petitioner. However, counterproposals must be technically and procedurally correct at the time of their filing. *See Hattiesburg, Mississippi*, 7 FCC Rcd 7602 (1992). *See also, Broken Arrow and Bixby, Oklahoma and Coffeeville, Kansas*, 3 FCC Rcd 6507 (1988), *recon. denied*, 4 FCC Rcd 6981 (1989). The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comments periods specified in the *Notice*. Furthermore, we find that Ranke's unauthorized pleadings would cause prejudice to another party and are of no decisional significance. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, Ranke's unauthorized pleadings and petitioner's response thereto, will not be accepted and considered in the resolution of this proceeding. We will dismiss the counterproposal.

Although we will dismiss the counterproposal due to the procedural defect, we comparatively considered the counterproposal and determined that even if the proposal was procedurally correct, the counterproposal would be denied on other grounds. In an effort to accommodate both proposals and resolve the conflict, the staff conducted a channel search which revealed that there were no alternate Class C3 channels available at Latta or Class A channels available at Blythewood. Therefore, our decision would be based on the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), which are: (1) First full-time aural service; (2) Second full-time aural service (3) First local service; and (4) Other public interest matters. [Priorities 2 and 3 have co-equal weight.] Neither petitioner or Ranke claim that their respective proposals would provide a first or second full-time aural service. (Ranke notes that a daytime AM channel was allotted to Blythewood but a station has never been built.) An engineering analysis has determined that the allotment of Channel 232A at Blythewood could possibly provide the community with a second local service, since Station WBAJ has an active construction permit to build an AM daytime station. The station's application for reinstatement of its construction permit (File No. BP-940630DC) was granted on August 23, 1994. Station WBAJ also filed applications for extension of time (File No. BMP-950222DC) and to modify its construction permit (BMP-950307AD), which are pending. Accordingly, since for purposes of Section 307(b) comparisons under the FM allotment priorities a first local service is generally preferred over a possible second local service, the Latta proposal would prevail. In addition, Latta is a more populous community with a population of 1,565 persons versus Blythewood with a population of 164 persons.

[4] Petitioner also filed an original of the Declaration of Gary M. Davidson to be substituted for the facsimile (Attachment 2) attached to the reply comments.

2. In support of its proposal, petitioner states that Latta is an incorporated community with a population of 1,565[5] persons. It has a mayor and town council, as well as numerous businesses, financial institutions, churches and civic organizations such as Lions Club and Rotary Club. In addition, Latta has its own police and volunteer fire departments. Petitioner also states that Marion (population 7,658), will not be deprived of its only local aural transmission service, since FM Station WKSY and AM Station WKXS will remain licensed to the community.

3. We believe the public interest would be served by the substitution of Channel 232C3 for Channel 232A at Marion, and its reallotment to Latta, since it would provide the community with its first local aural transmission service and enable Station WCMG(FM) to expand its coverage area. Specifically, the reallotment would result in a preferential arrangement of allotments pursuant to thehCommission's change of community procedures. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). Under those procedures, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities. *See Revision of FM Assignment Policies and Procedures*, fn.3.

4. In making this analysis, we find that under priority three, Latta would receive a first local transmission service. On the other hand, Marion already has an AM and FM local transmission service and, therefore, does not trigger priority three. Thus, it falls under priority four, other public interest factors. By comparison, we find that the reallotment to Latta should be made because it triggers the higher allotment priority of a first local transmission service. Furthermore, the reallotment will not remove the sole local transmission service, since FM Station WKSY and AM Station WKXS will remain licensed to the community. Latta is not located in or adjacent to an Urbanized Area. In addition, our engineering analysis indicates that the upgrade and reallotment to Latta will enable Station WCMG(FM) to provide service to a gain area of 3,032 square kilometers (1,171 square miles) with a population of 116,666, who will receive five or more full-time reception services. We recognize that the removal of Station WCMG(FM) from Marion will create a reception service loss area of 736 square kilometers (284 square miles) with a population of 20,380, who will continue to receive at least five full-time reception services.[6] While we carefully consider any proposal that would result in a loss of existing reception service, we believe the public interest is well-served by this reallotment proposal, given the large reception service gains, as well as the fact that this proposal permits a number of other service improvements as well.

5. An engineering analysis has determined that Channel 232C3 can be allotted to Latta in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.7 kilometers (6.6 miles) northwest to avoid short-spacings to vacant but applied for Channel 231A, Kingstree, South Carolina, and Station WZKB, Channel 232A, Wallace, North Carolina.[7] Additionally, Channel 274A can be allotted to Camden in compliance with the Commission's minimum distance separation requirements at Station WPUB-FM's licensed transmitter site.[8] In accordance with Section 1.420(i) of the Commission's Rules, we will modify Station WCMG(FM)'s license to specify operation on Channel 232C3 at Latta in lieu of Channel 232A at Marion, South Carolina. We will also modify Station WPUB-FM's license to specify operation on Channel 274A in lieu of Channel 232A at Camden, South Carolina.

6. Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). As indicated in the *Notice*, Kershaw Radio Corporation, licensee of Station WPUB-FM, has agreed to change channels in order to accommodate the Latta allotment. Accordingly, petitioner has stated its willingness to reimburse Station WPUB-FM for reasonable costs incurred in changing frequency.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61,0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 14, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Camden, South Carolina	274A
Latta, South Carolina	232C3
Marion, South Carolina	263C3

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Winfas of Virginia, Inc. for Station WCMG(FM), Marion, South Carolina, IS MODIFIED to specify operation on Channel 232C3 at Latta, South Carolina, in lieu of Channel 232A at Marion, South Carolina, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

[5] Population figures taken from the 1990 U.S. Census.

[6] When the areas and populations of Station WCMG(FM)'s current and proposed service areas are compared, there would be a net service gain of 96,286 people by granting the petitioner's proposal (*i.e.*, 116,666 people in the gain area of Latta minus 20,380 people in the loss area of Marion).

[7] The coordinates for Channel 232C3 at Latta are North Latitude 34-25-33 and West Longitude 79-29-57.

[8] The coordinates for Channel 274A at Camden are North Latitude 34-13-31 and WestLongitude 80-40-44.

9. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Winfas of Virginia, Inc., licensee of Station WCMG(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the change in community of license and upgrade.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Kershaw Radio Corporation for Station WPUB-FM, Camden, South Carolina, IS MODIFIED to specify operation on Channel 274A in lieu of Channel 232A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in WPUB-FM's license, BMLH-910305KA, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the rules, PROVIDED the transmission facilities comply in all respects with license BMLH-910305KA, except for the channel as specified above and license application (FCC Form 302) is filed within 10 days of commencement of program tests.

11. IT IS ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following licensees:

Winfas of Virginia, Inc. P.O. Box 4108 Lynchburg, Virginia 24502 (Licensee of Station WCMG(FM))	Kershaw Radio Corporation P.O. Box 753 Camden, South Carolina 29020 (Licensee of Station WPUB-FM))

12. IT IS FURTHER ORDERED, That the counterproposal filed by Joseph Adams Ranke to allotment Channel 232A at Blythewood, South Carolina, IS DISMISSED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 29, 1995

GTE TELEPHONE OPERATING COMPANIES FILE REVISIONS TO THEIR COST ALLOCATION MANUAL FOR THE SEPARATION OF REGULATED AND NONREGULATED COSTS TO REFLECT THE PROVISION OF VIDEO DIALTONE SERVICE

(PUBLIC COMMENT INVITED)

On June 5, 1995 the GTE Telephone Operating Companies (GTOCs) filed revisions to their Cost Allocation Manual (CAM) for the separation of regulated and nonregulated costs. These revisions define nonregulated video dialtone services and add information concerning the separation of costs for video dialtone services between regulated and nonregulated. The GTOCs filed these revisions pursuant to a Section 214 authorization that authorized provision of video dialtone service subject to several conditions, including a requirement that they file revisions to their CAM to reflect their provision of video dialtone service. *See* GTE Virginia, Inc., GTE Florida, Inc., GTE California, Inc., GTE Hawaiian Telephone Co., Inc. Section 214 Authorization, DA 95-102 (released May 5, 1995).

Parties may file comments on the proposed revisions to the GTOCs' CAM no later than July 20, 1995. Replies should be filed by August 4, 1995. Comments should reference AAD file number AAD 95-90. A copy of each pleading should be sent to M. Whiting Thayer, FCC, Common Carrier Bureau, 2000 L Street N.W., Room 812, Washington, DC, 20554 and the International Transcription Service (ITS), 2100 M Street N.W., Suite 140, Washington, DC 20037. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street N.W., Room 812, Washington, DC. Copies are also available from ITS.

For further information, contact M. Whiting Thayer at (202) 418-0822.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-217

In the Matter of

Amendment of Section 73.202(b),	RM-8069
Table of Allotments,	RM-8139
FM Broadcast Stations.	
(Camden, East Camden and Stamps, Arkansas; Gibsland and Minden, Louisiana)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 20, 1995; Released: June 29, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 7 FCC Rcd 6299 (1992), issued in response to a petition filed on behalf of Y95 Radio ("petitioner"), licensee of Station KCXY(FM),[2] Channel 237A, Camden, Arkansas. The *Notice* proposed the substitution of Channel 237C1 for Channel 237A at Camden, the reallotment of Channel 237C1 to East Camden, Arkansas, and modification of the license for Station KCXY(FM) accordingly. Additionally, to accommodate the proposal, petitioner requested the substitution of Channel 282A for Channel 238A at Stamps, Arkansas,[3] as well as the substitution of Channel 239A for Channel 237A at Minden, Louisiana, and concomitant modification of the license of Station KASO-FM, accordingly. An *Order to Show Cause* was issued to the licensee of Station KASO-FM directing it to demonstrate why its license should not be modified to specify operation on Channel 239A in lieu of Channel 237A.[4] Petitioner filed supporting and reply comments. Opposing comments were filed by LCB. A conflicting proposal was filed on behalf of Bienville Parish Broadcasting ("Bienville") requesting the allotment of Channel 239A to Gibsland, Louisiana.[5] Petitioner filed additional comments.[6]

2. As stated in the *Notice*, petitioner's proposal, filed pursuant to the provisions of Section 1.420(g) and (i) of the Commission's Rules, would provide a first local aural transmission service to East Camden (population 632),[7] an incorporated community having its own governmental structure, post office, businesses and organizations. With regard to the public interest benefits of its proposal, petitioner advises that it will provide East Camden with local programming designed to meet the needs and interests of that community. Moreover, petitioner asserts that implementation of its proposal will enable it to provide an expanded service to 166,603 persons in an area of 16,364 square kilometers, representing an increase of 137,855 persons and an area of 14,791 square kilometers. Additionally, petitioner avers that Camden (population 15,356) would not be deprived of local service.[8]

3. As an additional benefit of its proposal, petitioner stated that the requested channel substitution at Stamps, Arkansas, would provide that community with a 6 kilowatt Class A allotment, while the requested substitution at Minden, Louisiana, would also enable Station KASO-FM an opportunity to operate at maximum Class A facilities, representing an advantage presently unavailable at each community.

4. In response to the *Notice*, Beinville requested the allotment of Channel 239A to Gibsland, Louisiana, as a first local aural transmission service. Beinville's proposal is mutually exclusive with the proposed substitution of Channel 239A for Channel 237A at Minden, Louisiana, to accommodate the proposed allotment of Channel 237C1 to East Camden, Arkansas. The distance between Gibsland and proposed Channel 239A at the licensed site of Station KASO-FM, Minden, Louisiana, is 31 kilometers (19 miles) whereas a distanceof 115 kilometers (71 miles) is required in this instance.[9] In an effort to accommodate each proposal, we have determined the availability of an alternate channel to resolve the conflict between the mutually exclusive proposals. Specifically, we have determined that Channel 283A is available for consideration at Gibsland, which permits the consideration of Channel 239A at Minden without the need for a comparative analysis of the two proposals.

5. LCB objects to the requested substitution of Channel 282A for Channel 238A at Stamps since it could not be used from its present owner-designated site.[10] LCB claims

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[1] The community of Gibsland has been added to the caption.

[2] Although the *Notice* herein identified the petitioner Y95 Radio as the licensee of Station KCXY(FM), Camden, based upon counsel's representation, the Commission's records reflect that Gary D. Terrell is the licensee (see File No. BLH-871028KG). Therefore, references herein to the licensee of Station KCXY(FM) are directed to Gary D. Terrell.

[3] Lafayette County Broadcasting, Inc. ("LCB") is the applicant for Channel 238A at Stamps, Arkansas (File No. BPH-920401MB). LCB was served with a copy of the *Notice*.

[4] Cook Enterprises, Inc., the licensee of Station KASO-FM, Minden, Louisiana, did not respond to the *Order to Show Cause* and therefore, pursuant to Section 1.87 of the Commission's Rules, is deemed to have consented to the modification, as proposed.

[5] Public Notice of the counterproposal was given on December 29, 1992, Report No. 1922 (RM-8139).

[6] After the record closed, petitioner filed a motion to sever. Section 1.415(d) of the Commission's Rules does not authorize the filing of pleadings beyond the reply comment period unless specifically requested or authorized. Therefore, petitioner's additional comments will not be considered.

[7] Population figures cited herein are from the 1990 U.S. Census.

[8] In addition to Station KCXY, Camden is served locally by FM Stations KCAC, Channel 208A, KWEH, Channel 246C2 and KMGC, Channel 283A. Fulltime AM Stations KAMD and KOSG are also licensed to Camden.

[9] Coordinates for Channel 239A at Gibsland, Louisiana, are 32-30-54 and 92-58-54.

[10] Coordinates at the site specified by LCB for Channel 238A at Stamps are North Latitude 33-24-12 and West Longitude 93-29-21 (File No. BPH-920401MB). The distance between LCB's preferred operation on Channel 238A at Stamps and requested

that a relocation of the transmitter to the site indicated in the *Notice* for Channel 282A at Stamps would place its tower in a less desirable location, approximately 12 kilometers (7 miles) west of the community. LCB claims that the site to accommodate Channel 282A at Stamps consists mainly of bottom land located adjacent to the Red River. Thus, LCB asserts that it would be required to construct an extremely tall tower to accommodate the antenna for its proposed operation. Further, LCB asserts that as the useable area for Channel 282A at Stamps is further removed from centers of population, the degree of service it could provide, even with six kilowatts effective radiated power, would be diluted. LCB urges that it could operate on Channel 238A at its presently applied for site with six kilowatts by utilizing a directional antenna, thereby providing protection to Station KCXY on Channel 237A at Camden, while providing additional service to populous areas in the general vicinity of Stamps.

6. LCB urges denial of the petitioner's reallocation proposal for several reasons. First, LCB notes that petitioner may upgrade Station KCXY(FM) at its currently licensed site at Camden, from which 70 dBu coverage could be provided to East Camden as well. Thus, LCB urges that petitioner's proposal offers no improvement in the reception service Station KCXY(FM) would provide if reallotted to East Camden, nor would petitioner be able to provide East Camden with any specialized service. LCB claims that petitioner merely seeks enhancement of its upgrade request by proposing a first local service to the smaller community of East Camden. Further, LCB remarks that the larger community of Camden currently has three FM allotments representing one allotment per 5,118 persons, which would be reduced to one allotment per 7,678 persons if the proposal is granted. LCB asserts that as the less populous community of East Camden presently receives 70b dBu service from Station KWEH(FM), Channel 246C2, Camden, and 60 dBu service from Station KCXY(FM), petitioner has not demonstrated that the provision of a first local service to East Camden significantly outweighs the loss of the transmission service at Camden, citing *Van Wert, Ohio and Monroeville, Indiana,* 7 FCC Rcd 6519 (1992). LCB concludes that the reassignment of allotments from larger to smaller communities that provide no public interest benefits but merely are intended to enhance an upgrade proposal, is contrary to the Commission's intent in implementing its change in community of license policy to further the goals of Section 307(b) of the Communications Act of 1934, as amended.

7. With respect to LCB's objection to the proposed site change to accommodate the substitution of Channel 282A for Channel 238A at Stamps, petitioner comments that its proposal was filed prior to the effective date of the requirements for protection of pending site proposals by petitioners for new allotments. Therefore, petitioner asserts that LCB's objection is not valid.[11]

8. As pertains to the reallotment of Station KCXY(FM) to East Camden, petitioner reiterates that Camden will not be left unserved. Petitioner states that not only will it provide an improved service to Camden if its proposal is adopted, but the community will continue to receive local service from Station KWEH(FM), Channel 246C2 and Station KMGC(FM), Channel 283A, as well as from AM Stations KAMD and KOSG (formerly KJWH(AM)).

DISCUSSION

9. Initially, we address the proposed removal of a local transmission service at Camden. LCB's reliance on *Van Wert, Ohio and Monroeville, Indiana, supra,* for rejection of the proposed reallotment of Channel 237C1 to East Camden is misplaced. While the cited case also involved a proposed change in the community of license without a change in the level of reception service, the disruption in local service to the larger community was the pivotal factor. Specifically, although the reallotment proposal would have provided a first local transmission service to the smaller community of Monroeville, Indiana, it would have deprived the larger community of Van Wert, Ohio of its sole local competitive and sole local nighttime voice. Therefore, it was determined that there were insufficient public interest benefits to outweigh the loss of the transmission service to the original community of license.

10. Here, our analysis is based upon the transmission service gains and losses that would result from the reallotment of Channel 237C1 to East Camden. Reception service is not an issue in this proceeding as Station KCXY(FM) is not proposing to relocate its transmitter site. *Compare Eatonton and Sandy Springs, Georgia, et al.,* 6 FCC Rcd 6580 (1991), *recon. pend.* (reception gain and loss areas would result if change in community proposal was approved). In formulating our determination, we are guided by the Commission's change of community procedures. *See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"),* 4 FCC Rcd 4870 (1989), *recon. granted in part,* 5 FCC Rcd 7094 (1990) *(Change of Community MO&O").* Utilizing those procedures, we compare the existing arrangement of allotments with the proposal using our FM allotment priorities.[12]

11. Although Camden is larger than East Camden neither community is in an urbanized area. Camden presently has local transmission services provided by Station KCXY(FM), Station KCAC(FM), Channel 208A, Station KWEH(FM), Channel 246C2, Station KMGC(FM), Channel 283A, and fulltime AM Stations KAMD and KOSG. In our analysis, the first two allotment priorities are not implicated. Rather, the benefits of providing a first local transmission service to East Camden triggers allotment priority three (first local service), whereas the level of service remaining at Camden diminishes to priority four (other

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Channel 237C1 at East Camden at coordinates 33-30-14 and 92-48-38 is 64.1 kilometers (40 miles) whereas a distance of 133 kilometers (82 miles) is required between first adjacent Class A-C1 channels.

[11] In any event, petitioner's responsive comments included an engineering statement which indicates that LCB could operate on Channel 282A from its preferred site with 6 kilowatts effective radiated power pursuant to the provisions of Section 73.215 of the Commission's Rules.

[12] The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).| *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982).

public interest matters). Therefore, grant of petitioner's proposal would result in a preferential arrangements of allotments.

12. As to LCB argument that petitioner presently serves East Camden from its present site, and therefore would not be able to provide any specialized service to the new community, it is a licensee's primary obligation to serve the needs and interests of the community to which it is licensed.[13] Petitioner provided information relative to its obligation and intent to present programming designed to meet the local needs and interests of East Camden.

13. Based upon the information presented, we believe the public interest would be served by substituting Channel 237C1 for Channel 237A at Camden and reallotting Channel 237C1 to East Camden since a preferential arrangement of allotments will result. Furthermore, the reallotment will not result in the relocation of a station from a rural to a larger urban area. *See Change of Community, supra.* Accordingly, pursuant to the provisions of Section 1.420(g) and (i) of the Commission's Rules, we are modifying herein the license of Station KCXY(FM) to specify operation on Channel 237C1 at East Camden, Arkansas. Additionally, to accommodate the East Camden modification, we will substitute Channel 282A for Channel 238A at Stamps, Arkansas.[14] Lafayette County Broadcasting, Inc., the applicant for Channel 238A at Stamps, may amend its application to specify Channel 282A at that community without loss of cut-off protection. *See Salamanca, New York and Bradford, Pennsylvania,* 50 FR 26208 (1985), and *Sanibel, Florida,* 50 FR 32706 (1985). A copy of this *Report and Order* will be served on LCB. Additionally, as Cook Enterprises, Inc. ("Cook"), license of Station KASO-FM, Minden, Louisiana, filed no response to the *Order to Show Cause* why its license should not be modified to specify operation on Channel 239A in lieu of Channel 237A, it is deemed to have consented to the proposed modification to accommodate the East Camden proposal. In accordance with established Commission policy, Cook is entitled to reimbursement from Gary D. Terrell for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio,* 8 FCC 2d 159 (1967). Petitioner has previously stated a willingness to reimburse Cook accordingly.

14. In response to the counterproposal filed by Bienville, we will allot Channel 283A to Gibsland, Louisiana, in order to provide a first local aural transmission service to that community.

15. As indicated in the *Notice,* Channel 237C1 can be allotted to East Camden at the licensed site of Station KCXY(FM), at coordinates 33-30-14 and 92-48-38.[15] Channel 282A can be substituted for Channel 238A at Stamps, Arkansas, with a site restriction 12.2 kilometers (7.6 miles) west of the community at coordinates 33-23-20 and 93-37-38. The site restriction at Stamps is required to avoid short spacing to the site specified in the license issued to Station KMGC(FM) (File No. BLH-941201KA), Camden, Arkansas, at coordinates 33-30-14 and 92-48-38, and to the licensed site for Station KJLO-FM, Channel 281C, Monroe, Louisiana, at coordinates 32-39-36 and 92-05-15. Channel 239A can be substituted for Channel 237A at the licensed site of Station KASO-FM, Minden, Louisiana, at coordinates 32-37-50 and 93-16-56. Channel 283A can be allotted to Gibsland, Louisiana, with a site restriction 3.3 kilometers (2 miles) west of the community at coordinates 32-32-27 and 93-05-23, to avoid a short spacing to the licensed site of Station KJLO-FM, Channel 281C, Monroe, Louisiana, at the coordinates indicated above.[16]

16. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective August 14, 1995, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Camden, Arkansas	246C2, 283A
East Camden, Arkansas	237C1
Stamps, Arkansas	263C2, 282A
Gibsland, Louisiana	283A
Minden, Louisiana	239A

17. The window period for filing applications for Channel 283A at Gibsland, Louisiana, will open on **August 14, 1995**, and close on **August 29, 1995**.

18. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Gary D. Terrell (File No. BLH-871028KG), for Station KCXY(FM), IS MODIFIED to specify operation on Channel 237C1 at East Camden, Arkansas, in lieu of Channel 237A at Camden, Arkansas, subject to the following conditions:

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[13] *See* Section 73.1120 of the Commission's Rules.

[14] Petitioner's proposal was filed prior to the effective date of MM Docket 92-348. *See Conflicts between Applications and Petitions for Rulemakings to Amend the FM Table of Allotments,* MM Docket No. 91-348, 7 FCC Rcd 4917 (1991). As LCB's comments did not demonstrate overriding public interest benefits to warrant a preference over those to be derived from the petitioner's proposal, LCB's application for a selected location at Stamps must be considered a site preference only. *See Andalusia, Alabama,* 49 FR 32201 (1984).

[15] As indicated in the *Notice,* Channel 237C1 at East Camden is short spaced to the licensed site of Station KMTB(FM), Channel 237A, Murfreesboro, Arkansas, at coordinates 34-05-44 and 93-41-31, and is therefore dependent upon Station KMTB(FM) moving to Channel 258C3 pursuant to the modification provisions set forth in MM Docket No. 89-290. *See Report and Order* (MM Docket No. 89-290), 7 FCC Rcd 5493 (1992). An application for a license to cover the construction permit issued to Station KMTB(FM) on Channel 258C3 at Murfreesboro is pending (File No. BLH-941104KB and File No. BPH-930111IF). Therefore, the issuance of a license for Station KCXY(FM) on Channel 237C1 may be withheld until Station KMTB(FM) is licensed on its new channel at Murfreesboro. We will serve Penn-Lee Broadcasting, Inc., the licensee of Station KMTB(FM) with a copy of this *Report and Order.*

[16] We recognize that the allotment of Channel 283A at Gibsland is short spaced to the license issued to Jade Communications, Inc. ("Jade") (File No. BLH-941201KA) for Station KMGC(FM) to operate on Channel 283A at Camden, Arkansas, at coordinates 33-30-14 and 92-48-38. However, the Camden authorization was granted in accordance with the provisions of Section 73.215 of the Commission's Rules which allows contour protection for short spaced assignments. We will serve Jade with a copy of this *Report and Order.*

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

19. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Cook Enterprises, Inc. (File No. BLH-7846) for Station KASO-FM, Minden, Louisiana, IS MODIFIED to specify operation on Channel 239A in lieu of Channel 237A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KASO-FM's license (File No. BLH-7846), except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license File No. BLH-7846, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

20. Pursuant to Commission Rule Section 1.1104(1)(k) and 2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Gary D. Terrell, licensee of Station KCXY(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the change in community of license and upgrade at East Camden, Arkansas.

21. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following:

Cook Enterprises, Inc.
P.O. Box 1240 Minden, LA 71055
(Licensee of Station KASO-FM))

Lafayette County Broadcasting, Inc.
Rte. 1, Box 179
Stamps, AR 71860
(Applicant - Stamps, AR)

Penn-Lee Broadcasting, Inc.
P.O. Box 907
Murfreesboro, AR 71958
(Licensee of Station KMTB(FM))

Jade Communications, Inc.
P.O. Box 44
Camden, AR 71701
(Licensee of Station KMGC(FM))

22. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

23. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 283A at Gibsland, Louisiana, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-33

In the Matter of

Amendment of Section 73.202(b), RM-8597
Table of Allotments,
FM Broadcast Stations.
(Fairbanks, Alaska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 20, 1995 **Released: June 29, 1995**

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 10 FCC Rcd 3320 (1995), issued in response to a petition for rule making filed by Northern Television, Inc. ("petitioner") proposing the allotment of Channel 245C3 to Fairbanks, Alaska, as that community's sixth local FM service. Petitioner filed supporting comments in response to the *Notice*.[1] No other comments were received.

2. In view of the petitioner's stated interest in providing a sixth local FM service to Fairbanks, we will allot Channel 245C3 to that community, as requested.

3. As stated in the *Notice*, Channel 245C3 can be allotted to Fairbanks in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (2) of the Commission's Rules without a site restriction, at coordinates North Latitude 64-50-16 and West Longitude 147-42-59. As Fairbanks is located within 320 kilometers (199 miles) of the United States-Canadian border, the Commission obtained the concurrence of the Canadian government in the proposed allotment of Channel 245C3 to that community.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 14, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Fairbanks, Alaska, as follows:

City	Channel No.
Fairbanks, Alaska	240C3, 245C3, 251C2, 266C2, 273C1, 284C3

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications for Channel 245C3 at Fairbanks, Alaska, will open on **August 14, 1995** and close on **September 14, 1995**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 245C3 at Fairbanks, Alaska, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial com-

[1] As stated in the *Notice*, petitioner's request, although signed, failed to include an affidavit verifying statements contained in its petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has complied accordingly.

ments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-10

In the Matter of

Amendment of Section 73.202(b) RM-7865
Table of Allotments,
FM Broadcast Stations.
(Sanibel and San Carlos Park, Florida)

REPORT AND ORDER
Proceeding Terminated)

Adopted: June 21, 1995; Released: June 29, 1995

By the Chief, Allocations Branch:

1. At the request of Ruth Communications Corporation ("Ruth"), permittee of Station WRWX(FM), Channel 253A, Sanibel, Florida, the Commission has before it for consideration the *Notice of Proposed Rule Making* ("*Notice*"), 7 FCC Rcd 850 (1992), proposing the reallotment of Channel 253A from Sanibel to San Carlos Park, Florida, as that community's first local transmission service. Ruth also requested the modification of its construction permit to specify San Carlos Park as its community of license. Ruth and Sunshine Broadcasting, Inc. ("Sunshine"), licensee of Station WSUV, Channel 292A, Fort Myers Villas, Florida, filed comments. Ruth filed reply comments.

2. The *Notice* stated that the reallotment of Channel 253A to San Carlos Park would provide that community with its first local transmission service, whereas it is currently impossible to provide transmission service at Sanibel. Ruth noted that it has been attempting to construct and operate Station WRWX(FM) at Sanibel since September 1988. However, various federal, state and local authorities have objected to petitioner's proposed transmitter site. The site Ruth originally specified in a 1983 application (File No. BPH-830217AI) for the Sanibel allotment has been declared as environmentally sensitive wetlands and is no longer available, and the city of Sanibel has purchased surrounding property as a conservation area. Ruth claims that local zoning ordinances prohibit construction of a tower elsewhere on Sanibel Island, and no site is available on nearby Pine Island for construction of a new tower. It also states that operation from an existing microwave tower on Pine Island or the mainland is not possible because of short-spacing or other technical concerns. Ruth notes that it has attempted to use a directional antenna for a site on Pine Island to avoid the short-spacing, but the proposed tower site would be located near a bald eagle's nest, and the Florida Game and Fresh Water Commission rejected that proposal. Ruth states that its attempts to reach a compromise with the state agency were unsuccessful. As a consequence, Ruth has never operated Station WRWX(FM) at Sanibel. Ruth claims that if the channel were reallotted to San Carlos Park, it could operate Station WRWX(FM) from an existing tower.

3. Sunshine in its comments argues that there are transmitter sites available that would provide city-grade coverage to Sanibel. Sunshine submits an aeronautical chart that shows that there are two towers on Pine Island. Although Sunshine states that these towers are too far north to be used by Ruth, it claims that the existence of the towers establishes that there are feasible sites on Pine Island. In addition, Sunshine claims that two pending applications for a vacant allotment at Punta Rassa, Florida, proposes transmitter site locations that would provide a city grade signal over Sanibel. Sunshine claims that if these sites are actually available, then there is no reason to change the community of license for WRWX(FM).[1] Sunshine claims that Ruth can move anywhere on Pine Island south of its formerly proposed site without causing any short-spacing to other facilities. Sunshine argues the fact that Ruth's preferred site was opposed by the Florida Game and Fresh Water Commission does not establish that any site in the area would be opposed or that there are no alternate sites available.

4. Ruth in its reply comments argues that Sunshine's comments do not provide sufficient evidence to support asking the Commission to reverse its initial determination in the *Notice* that removal of the sole local transmission service may be warranted in this instance. Ruth claims that Sunshine has failed to provide any specific evidence of a suitable transmitter site that would serve Sanibel, and this failure undermines its arguments that a transmitter site is available. Ruth argues the fact that applicants in another proceeding have proposed sites on Pine Island provides no factual basis on which to conclude that a site elsewhere on Pine Island would receive local zoning approval for construction of a broadcast tower. Ruth notes that an applicant for a new FM radio broadcast facility only needs reasonable assurance that a proposed transmitter site is available. However, a threshold showing provides no evidence that an applicant will be able to secure necessary zoning or other approval to build a transmitter tower, and the grant of a construction permit is not conditioned upon any showing of local approval.

5. Ruth argues that Sunshine is incorrect in its claim that Ruth may be able to construct a broadcast tower on Pine Island. Ruth contends that it considered three sites on the island. Ruth rejected one potential site because it would not comply with the Commission's spacing requirements, the owner of the second site rejected Ruth's offer

[1] Conversely, Sunshine questions the validity of the reasonable assurance of site availability regarding the applications in the Punta Rassa proceeding. According to a staff engineering analysis (Application File No. BPH-880303MQ and BPH-880224MN would provide 70 dBu city grade coverage to Sanibel, but they are both located on Pine Island, and would be precluded because of environmental restrictions. In addition, Application File No. BPH-880303MH and BPH-880303MG are both located on the mainland of Florida, but neither application provides 70 dBu city grade coverage to Sanibel. We note that Kight Broadcasting Limited Partnership (BPH-880303MH) has been selected as the permittee for Channel 249A, Punta Rassa, Florida. *See Initial Decision*, 7 FCC Rcd 83 (1992). However, Palm Tree Limited Partnership filed a Petition for Reconsideration claiming that the integration analysis in the decision was arbitrary and capricious, citing *Bechtel v. FCC*, No. 92-1378 (December 12, 1993). Therefore, the construction permit is being held in abeyance pending the ultimate outcome of the Bechtel case.

for that site, and the third site was rejected because it was located within a protected zone one mile from an eagle's nest. Ruth states that based on its experience with the local zoning and environmental authorities, local experts on obtaining zoning permits, and its previous efforts to locate an available site, it has determined that no sites are available which would be consistent with environmental guidelines and which would receive the necessary zoning approval. Ruth submits the Southern Eagle Nesting Site Map for the 1989-1990 nesting season, prepared by the Lee County Eagle Technical Advisory Committee ("ETAC"), which shows at least thirteen eagle nesting sites on Pine Island, with six sites located on the southern portion of the island. Each nesting site may include more than one eagle's nest. Because of the large number of nests and the wide area a tower would require, Ruth alleges, a tower would not be permitted. Furthermore, Ruth would have to file multiple requests for additional sites with the Lee County ETAC in order to determine whether an eagle's nest is located within the proximity of the proposed tower. Ruth claims that even if it were to locate a site not presently near an eagle's nesting area, by the time a construction permit is granted, a new eagle's nest could have been built near that site.

6. In response to Sunshine's assertion that the existence of two towers on Pine Island north of Ruth's existing site proves that there are suitable sites for a tower on the southern portion of Pine Island, Ruth submits an engineering statement demonstrating that the existing towers will not place a city-grade signal over Sanibel. Furthermore, one of the towers, a 250 foot high cable television tower located in Sanibel Gardens, already includes several existing microwave antennas and could not support any more antennas. In addition, Ruth states that an FM antenna on a cable tower at a cable headend would cause interference to cable subscribers. Because of these problems, the tower owner will not permit Ruth to construct and operate an FM antenna on its tower. Further Ruth submits information confirming that the local zoning officials for Sanibel Island will not permit construction of a new radio broadcast tower on Sanibel Island.

7. *Background:* Hillebrand Broadcasting, Inc., the predecessor corporation to Ruth, filed the original application for a construction permit for Channel 285A at Sanibel, Florida. Subsequently, Channel 253A was substituted for Channel 285A at Sanibel, Florida. *See MM Docket No.* 84-1314, 50 FR 32706, August 14, 1985. A comparative hearing was held on March 10, 1986, at which time Ruth was granted a construction permit. However, two of the losing applicants appealed. The three parties reached a settlement agreement, which was approved by the Review Board. The Commission granted Ruth's application for a construction permit on September 24, 1986. Public Notice No. 19917, released October 24, 1986, stated that grant of the construction permit would not be final until the outcome of a Commission decision on a pending "Application for Review" filed by Punta Ybel. Punta Ybel's application was dismissed for failure to prosecute, it filed a series of unsuccessful appeals of its dismissal. The Presiding judge, Review Board, and the Commission dismissed Punta Ybel's appeals. *See Hillebrand Broadcasting,* 102 FCC 2d 804 (Rev. Bd. 1985), *recon. denied,* 102 FCC 2d 809 (Rev. Bd. (1985), *review denied,* 1 FCC Rcd 419 (1986). The court of appeals denied Ybel's petition. A final construction permit was issued in September 1988.

8. The original application filed in 1983 specified a tower site in Sanibel Gardens, which is located on Sanibel Island. Ruth was told by the Planning Commission that Sanibel Gardens was the only location for its proposed tower that was acceptable to local zoning authorities at that time. Between the time Ruth filed its application and Punta Ybel exhausted its appeals in September 1988, Sanibel Gardens was declared an environmentally sensitive wetlands - this eliminated the proposed site. Then, Ruth met with the Sanibel Planning Commission again to seek a special use permit for a tower at an alternative site in Sanibel. Ruth was informed that the State of Florida had required all incorporated city and counties to submit 20 year plans on how they intended to accommodate growth. After the Commission approved the 20 year plans, it was determined that radio broadcast towers and antennas were no longer permitted in any of the city's zoning districts. Thereafter, Ruth considered two sites on Pine Island, which were found to be unacceptable. In June 1989 Ruth meet with a real estate agent on Pine Island to explore whether a site on that Island would be acceptable. A site was found that seemed to be acceptable subject to Federal Aviation Administration ("FAA"), Federal Communications Commission ("FCC"), and zoning approval. On August 1, 1989, Ruth was informed that the site would not fully comply with the Commission's spacing requirements. A change in the Commission's Rules permitted Ruth to reconsider its original site on Pine Island by using six kilowatt and a directionalized antenna, *See Amendment of Part 73 of the Rules to Provide For an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations (Second Report and Order),* 4 FCC Rcd 6375 (1989). On October 2, 1989, Ruth filed an application (BPH-891002IA) for the Pine Island site, specifying six kilowatts with a directional antenna. Ruth received FAA approval on March 1, 1990. In June 1990 an eagles nest was discovered on Pine Island 1300 feet from the proposed tower site. On August 22, 1990, the Florida Game and Fresh Water Commission rejected Ruth's proposed tower site, concluding that the tower posed a threat to the eagles. On March 16, 1991, Ruth filed a petition for rule making requesting that the Commission change the community of license for station WRWX(FM) from Sanibel to San Carlos Park, Florida.

9. Upon review of this proposal, we believe that the reallotment of Channel 253A from Sanibel, Florida, to San Carlos Park, Florida, will result in a preferential allotment based on the above information. We are convinced that Ruth has made every reasonable effort to secure a site at Sanibel and none appears to be available. In addition, the reallotment of Channel 253A from Sanibel (population 5,468) to San Carlos Park (population 11,785) will provide the larger community with a first local transmission service. While it also removes Sanibel's sole local potential service, Sanibel will continue to receive reception service from at least 17 stations.[2] Moreover, since the station has

[2] Sanibel presently receives reception service from the following stations: WAYJ(FM), Channel 204C2, WSFP(FM), Channel 211C1, WJYO(FM), Channel 218A, WOLZ(FM), Channel 237C1, WINK(FM), Channel 245C, WHEW(FM), and Channel 270C, Fort Meyers, Florida; WSOR(FM), Channel 215C1, WCVU(FM), and Channel 233C, Naples, Florida; WIKX(FM), Channel 225C2, Punta Gorda, Florida; WRXK(FM), Channel 241C, Bonita Springs, Florida; WJBX(FM), Channel 257C2, Fort

never been on the air. this change in community will not cause any disruption to an existing service. While we consider important the potential service that unbuilt stations represent, we acknowledge that they are not a service on which the public has come to rely on. Therefore, we do not consider their removal from a community to represent the same concerns with loss of service that removal of an operating station would represent. *See Pawley's Island and Atlantic Beach, South Carolina*, 8 FCC Rcd 8657 (1993) and *Glencoe and Le Sueur, Minnesota*, 7 FCC Rcd 7651 (1992).

10. Channel 253A can be allotted to San Carlos Park in compliance with the Commission's minimum distance separation requirements with a site restriction 10.9 kilometers (6.8 miles) west.[3] In accordance with Section 1.420(i) of the Commission's Rules, we will modify the construction permit for Station WRWX(FM) to specify San Carlos Park, Florida, as its community of license on Channel 253A.

11. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 14, 1995,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Sanibel, Florida	--
San Carlos Park, Florida	253A

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WRWX(FM), IS MODIFIED, to specify San Carlos Park, Florida, as its community of license on Channel 253A, in lieu of Channel 253A at Sanibel, Florida, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

13. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Ruth Communications Corporation, permittee of Station WRWX(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the change of community of license.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

Meyers Beach, Florida, WROC(FM), Channel 292A, Fort Myers Villas, Florida; WEEJ(FM), Channel 261C1, Port Charlotte, Florida; WAVV(FM), Channel 266C1, Marco, Florida; WXKB(FM), Channel 279C2, Cape Coral, Florida; WIXI(FM), Channel 288C3, Naples Park, Florida; and WCKT(FM), Channel 296C2, Lehigh Acres, Florida.

[3] The coordinates for Channel 253A at San Carlos Park are North Latitude 26-30-02 and West Longitude 81-54-16.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-103

In the Matter of

Amendment of Section 73.202(b) RM-7174
Table of Allotments,
FM Broadcast Stations
(Mount Pleasant, Iowa)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 21, 1995; Released: June 29, 1995

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order, ("Report and Order")* 5 FCC Rcd 6626 (1990), in this proceeding, filed by Susan I. Coloff ("Coloff"), permittee of Station KMCH, Channel 234A, Manchester, Iowa. The *Report and Order* substituted FM Channel 288C3 for Channel 288A at Mount Pleasant, and modified the license for Station KILJ to specify operation on the higher powered channel.[1]

2. Coloff, in her counterproposal to the above proceeding, requested that Channel 281C3 be allotted to Mount Pleasant instead of the proposed Channel 288C3 in order to resolve conflicting requests in MM Docket No. 89-521. *See* 4 FCC Rcd 8204 (1989) and counterproposals thereto. In MM Docket No. 89-521, Coloff sought the substitution of Channel 234C3 for Channel 234A at Manchester and the modification of Station KMCH's authorization to specify operation on the higher powered channel. Her request conflicted with the pending request of K to Z, Ltd., to allot Channel 249C3 to Lancaster, Wisconsin. To accommodate Channel 249C3 at Lancaster, K to Z, also proposed the substitution of Channel 271A for Channel 236A at Morrison, Illinois, and Channel 234A for Channel 249A at Clinton, Iowa. Coloff's request was short spaced to the proposed substitution at Clinton.

3. In the *Report and Order*, in MM Docket 89-521, 6 FCC Rcd 6113 (1991), the Commission granted Coloff's proposal to substitute Channel 234C3 for Channel 234A at Manchester on the grounds that the adoption of the Manchester proposal would provide the benefits of a new service to the greatest number of people. Therefore in light of the above, Coloff's petition for reconsideration in the instant proceeding will be dismissed as moot.

4. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Susan I. Coloff and related comments ARE HEREBY DISMISSED AS MOOT.

5. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Bruce F. Elving IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 776-1660.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

[1] A petition for reconsideration was also filed by Bruce F. Elving ("Dr. Elving"). KILJ, Inc. filed opposing comments. Dr. Elving requested that we downgrade KILJ-FM's present Channel 288C3 to Channel 288A and consolidate their upgrade proposal with his proposal to upgrade Station KLVN, Channel 241C2, Newton, Iowa, to Channel 239C1. In MM Docket No. 89-379, 7 FCC Rcd 1370 (1992), we denied Dr. Elving's proposal on the grounds that he was neither a principal nor authorized to act on behalf of Station KLVN-FM. In addition, the upgrade procedure under Section 1.420(g) of the Commission's Rules is limited to licensees and permittees. Here, for certain procedural deficiencies, we will also deny Dr. Elving's petition for reconsideration. Standing to file a petition for reconsideration is conferred by Section 405 of the Communications Act of 1934, as amended and Section 1.106(b) of the Commission's Rules. Specifically, a petition for reconsideration may be filed only by: (1) a party to the proceeding, or (2) any other person aggrieved or whose interests are adversely affected by action taken, and, who, in addition, shows good reason why it was not possible to participate in the earlier stages of the proceeding. In this case, we first note that Dr. Elving has never been a party to this proceeding. Second, since Dr. Elving is neither a principal nor authorized to act on behalf of the station he purports to work for, he has failed to show how he has been aggrieved by our actions in Mt. Pleasant or how his interest have been adversely affected. Consequently, Dr. Elving, has failed to meet either of the two standards for filing a petition for reconsideration. In light of the above, and since Dr. Elving raises no new matters not previously considered, we conclude that reconsideration on the merits of our action granting the upgrade of Station KILJ-FM from Channel 288A to Channel 288C3 would serve no useful purpose and therefore will not be considered.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION,
Complainant,

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, and SOUTH CENTRAL BELL TELEPHONE COMPANY,
Defendants.

File No. E-92-23
File No. E-92-36

ORDER

Adopted: June 22, 1995; Released: June 29, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On January 29, 1992, LiTel Telecommunications Corporation filed the above-captioned complaints against the defendants seeking to recover damages from the defendants for alleged violations of the Commission's rules in connection with the defendants' computation and assessment of terminating carrier common line ("CCL") charges. On June 14, 1995, and on June 16, 1995, the parties filed joint motions to dismiss the complaints stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting the parties' joint motions to dismiss the complaints with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motions to Dismiss ARE GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY,
Complainant,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendant.

File No. E-92-50

ORDER

Adopted: June 22, 1995; Released: June 29, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On February 21, 1992, Charter Network Company filed the above-captioned complaint against BellSouth Telecommunications, Inc., (BellSouth) seeking to recover damages from BellSouth for alleged violations of the Commission's rules in connection with BellSouth's computation and assessment of terminating carrier common line ("CCL") charges. On June 14, 1995, the parties filed a joint motion to dismiss the complaints stating that the parties have negotiated a mutually agreeable settlement of all pending controversies.

2. We are satisfied that granting the parties' joint motion to dismiss the complaint with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-571

Appointment of the Telecommunications Relay Services (TRS) Fund Administrator and Composition of the TRS Advisory Committee

MEMORANDUM OPINION AND ORDER

Adopted: June, 20; **Released: June 29, 1995**

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 3, 1995, the Commission issued a public notice requesting proposals from parties interested in being appointed Telecommunications Relay Services (TRS) Fund administrator (Administrator) at the end of the current Administrator's term.[1] The public notice also requested comment on whether the TRS advisory committee (Committee) should be expanded by adding two additional reimbursable positions for state relay administrators.[2] A proposal to be reappointed Administrator was filed by the current Administrator, the National Exchange Carrier Association (NECA). Eleven comments and two reply comments were also filed.[3] In thisMemorandum Opinion and Order, we reappoint NECA Administrator for a four year term.[4] In addition, we authorize NECA to add up to two additional reimbursable positions to the Committee for state relay administrators.

II. BACKGROUND

2. TRS is a telephone transmission service that allows people with hearing and/or speech impairments to use the telephone. TRS facilities are equipped with special equipment and staffed by communications assistants (CAs) who relay conversations between people who use text telephones and people who use traditional telephones. The TRS Fund is a shared funding mechanism for recovering the costs involved in providing interstate TRS service. *See* 47 C.F.R. § 64.604(c)(4)(ii). All carriers providing interstate telecommunications service are required to contribute a portion of their gross interstate revenues to the TRS Fund, *see* 47 C.F.R. § 64.604(c)(4)(iii)(A)-(B), and TRS providers receive payments from the Fund designed to compensate them for the reasonable costs incurred in providing interstate TRS service. *See* 47 C.F.R. § 64.604(c)(4)(iii)(E).

3. When the TRS Fund was established, the Commission appointed NECA Administrator for an interim two year term beginning July 26, 1993 and ending July 25, 1995. *See Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Third Report and Order (Third Report and Order), 8 FCC Rcd 5300, 5300-01 (1993). The Administrator's responsibilities include collecting contributions from carriers, distributing funds to TRS providers, and filing proposed payment formulas and revenue requirements with the Commission. *See* 47 C.F.R. § 64.604(c)(4)(iii). In the Third Report and Order, the Commission stated that it would review NECA's performance at the end of the interim term, and would request comments on that performance as well as proposals from other parties interested in serving as Administrator. 8 FCC Rcd at 5301. The Commission requested comment on NECA's performance, and proposals from other parties, in the public notice released February 3, 1995.[5]

4. Pursuant to requirements contained in the Commission's rules, the Administrator has established a voluntary advisory committee to monitor TRS cost recovery issues. *See* 47 C.F.R. § 64.604(c)(4)(iii)(H). The Committee consists of persons from the following groups: (1) the hearing and speech disability community; (2) TRS users; (3) interstate service providers; (4) TRS providers; and (5) state representatives. *See* 47 C.F.R. § 64.604(c)(4)(iii)(H). Although Committee members are not paid for their services, *see* 47 C.F.R. § 64.604(c)(4)(iii)(H), the Commission has authorized NECA to reimburse up to two individuals from each of the above groups for the reasonable costs they incur in attending Committee meetings. *Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Second Order on Reconsideration and Fourth Report and Order, 9 FCC Rcd 1637, 1639-40 (1993).

5. At the Committee's behest, NECA has filed a request for authorization to add two additional reimbursable positions to the Committee, in the state representative category, for state relay administrators. *See* NECA, "Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate" at 10-11; *see also Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, CC Docket 90-571, Order, 10 FCC Rcd 1191, 1192 (Com. Car. Bur. 1994). NECA explains that two state regulators occupy the two reimbursable positions currently

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[1] *See* Public Notice, Mimeo No. 51973, "FCC Requests Proposals for Telecommunications Relay Services (TRS) Fund Administrator and Comments on Composition of the TRS Advisory Committee," released February 3, 1995.

[2] The current Committee members are reimbursed for the reasonable costs they incur in attending Committee meetings. *See infra* para. 4.

[3] Comments were filed by AT&T Corp. (AT&T), Hamilton Telephone Company (Hamilton), MCI Telecommunications Corp. (MCI), the National Association of Regulatory Utility Commissioners (NARUC), the National Association for State Relay Administration (NASRA), NECA, the National Telephone Cooperative Association (NTCA), Sprint Communications Company, L.P. (Sprint), the Telecommunication Access for Communication Impaired Persons Board (TACIP), Telecommunications for the Deaf, Inc. (TDI), and the Wisconsin Department of Administration (Wisconsin DOA). Reply comments were filed by NECA and the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO).

[4] This matter is being addressed by the Common Carrier Bureau pursuant to delegated authority. *See* 47 C.F.R. §§ 0.91, 0.291.

[5] *See supra* note 1.

available in the state representative category. NECA states that, if authorized, it will add to this category two additional reimbursable positions for state relay administrators.

III. APPOINTMENT OF THE TRS FUND ADMINISTRATOR

6. *NECA Proposal.* NECA proposes that it be reappointed as Administrator of the TRS Fund. In support of its proposal, NECA asserts that its performance during the interim two year term demonstrates its ability to act as Administrator. In particular, NECA states that during the interim term it collected funds from over 2800 carriers, distributed funds to TRS providers, and conducted on-site audits of TRS providers to insure the accuracy of reported data. NECA also states that it has established the advisory Committee pursuant to 47 C.F.R. § 64.604(c)(4)(iii)(H), and provided the Committee with technical and administrative support. In addition, NECA states that it has filed proposed payment formulas with the Commission pursuant to 47 C.F.R. § 64.604(c)(4)(iii)(E), (H), and that these payment formulas have been approved by the Commission as filed. Finally, NECA states that its first year administrative costs were seventeen percent below budgeted amounts, and that an independent auditor has attested to the accuracy of NECA's financial reporting.[6]

7. *Comments.* The commenters spoke favorably of NECA's performance as Administrator and indicated strong support for NECA's "reappointment."[7] Specifically, Hamilton states that NECA has performed its functions as Administrator "carefully, efficiently, [and] accurately," and that NECA's administrative expenses have been reasonable.[8] NTCA states that "NECA has done an outstanding job administering the TRS Fund,"[9] a statement with which OPASTCO agreed.[10] TDI states that NECA has "demonstrated its expertise and competence as fund administrator" and recommends NECA's reappointment.[11] MCI indicates that it has no complaints concerning NECA's administration of the TRS Fund.[12] NARUC's comments include a resolution suggesting that NECA continue to administer the Fund.[13] Favorable comments on NECA's performance were also filed by NASRA, Sprint, TACIP and Wisconsin DOA. No commenter opposed NECA's reappointment.

8. *Decision.* The record indicates that NECA has satisfactorily performed its duties as Administrator during the interim two year term. As required by the Commission's rules, NECA has collected and distributed TRS funds, established the Committee, and filed payment formulas and other required data with the Commission. *See* 47 C.F.R. § 64.604(c)(4)(iii). NECA has also provided the Commission with access to the data collected, *see* 47 C.F.R. § 64.604(c)(4)(iii)(H), and has made this data available to the Commission in a useful and convenient form. The commenters also speak favorably of NECA's performance as Administrator and generally indicate strong support for NECA's reappointment. We also note that NECA has operated within its established budget, and that an independent auditor has found that NECA's TRS financial statements are in accord with generally accepted accounting principles.[14] Finally, we note that NECA is the only entity to file a proposal requesting appointment as Administrator. Based on the forgoing, we conclude that the public interest will be served by NECA's reappointment as Administrator of the TRS Fund.

9. We must establish the length of the term to which NECA is appointed. In setting this term, we are guided, first, by NECA's performance of record. Even parties opposed to NECA's initial selection do not object to its reappointment, and this performance merits reappointment for a longer period. Second, we believe a longer appointment period will provide consistency in data collection and procedures in the administration of the TRS Fund. This consistency should enable all parties to operate more efficiently. Finally, we note that NECA will continue to be subject to yearly audits pursuant to 47 C.F.R. § 64.604(c)(4)(iii)(D). Under these circumstances, we conclude that a four year term is reasonable. Accordingly, we are appointing NECA to a four year term, beginning July 26, 1995 and ending July 25, 1999. At the end of this term we will again review NECA's performance.

IV. COMPOSITION OF THE TRS ADVISORY COMMITTEE

10. *Comments.* The proposal to add two reimbursable positions to the Committee for state relay administrators was supported by all commenters addressing this issue.[15] The commenters generally indicate that state relay administrators possess unique knowledge and perspectives that will be of assistance to the Committee, and that the additional costs involved will be minimal. NECA notes that while state regulators are familiar with pricing issues and state regulations, state relay administrators are familiar with the actual operation of relay centers. It believes that the presence of representatives from both of these groups would add value to the Committee's deliberations.[16] NECA also states that the additional costs would be *de minimis*[17] and "far outweighed by the value and unique expertise [state relay administrators] would bring to the [Committee]."[18]

11. *Decision.* The record indicates that state relay administrators can provide relevant information that will assist the Committee in its deliberations. In addition, we agree that the additional expense involved should be minimal because Committee members are not paid for their ser-

[6] Comments of NECA at 3, Appendix A (TRS financial statements and auditor's report).
[7] Comments concerning appointment of the Administrator were filed by Hamilton, MCI, OPASTCO, NARUC, NASRA, NTCA, Sprint, TACIP, TDI and Wisconsin DOA.
[8] Comments of Hamilton at 2.
[9] Comments of NTCA at 2.
[10] Reply Comments of OPASTCO at 4.
[11] Comments of TDI at 2.
[12] Comments of MCI at 2. We note that MCI initially opposed NECA's selection as Administrator. *See* 8 FCC Rcd at 5300-01.
[13] Comments of NARUC at 3, 5.
[14] Comments of NECA, Appendix A (auditor's report).
[15] Comments addressing this issue were filed by AT&T, MCI, NARUC, NASRA, NECA, NTCA, TACIP, TDI and Wisconsin DOA.
[16] Comments of NECA at 8-9.
[17] Reply Comments of NECA at 9.
[18] Comments of NECA at 9.

vices, and are reimbursed only for reasonable costs incurred in attending Committee meetings. *See* 47 C.F.R. § 64.604(c)(4)(iii)(H); 9 FCC Rcd at 1640. Finally, we note that all commenters addressing this issued favored the Committee's proposal. Accordingly, we grant the Committee's request, and authorize NECA to add up to two additional reimbursable positions to the Committee, in the state representative category, for state relay administrators.

V. CONCLUSION

12. For the foregoing reasons, we appoint the National Exchange Carrier Association (NECA) TRS Fund Administrator for a four year term beginning July 26, 1995 and ending July 25, 1999. Inaddition, we authorize NECA to add up to two additional reimbursable positions to the TRS advisory committee, in the state representative category, for state relay administrators.

VI. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that the National Exchange Carrier Association (NECA) is appointed TRS Fund Administrator for a four year term beginning July 26, 1995 and ending July 25, 1999.

14. IT IS FURTHER ORDERED, that the TRS Fund Administrator is authorized to add two additional reimbursable positions to the TRS advisory committee, in the state representative category, for state relay administrators.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ROTHSCHILD BROADCASTING, INC. File No. BRH-901129WM

For Renewal of the License of
WVAY(FM), Wilmington, Vermont

ROTHSCHILD BROADCASTING, INC. File Nos. BPFT-910705TC
BPFT-911203TB

For New FM Translators at
Jamaica, Vermont and
Marlboro/Jacksonville, Vermont

MEMORANDUM OPINION AND ORDER

Adopted:June 5, 1995; Released: June 29, 1995

By the Commission:

1. The Commission has under consideration Applications for Review filed on June 4, 1992 and December 7, 1992 by Northshire Communications, Inc. ("Northshire"), licensee of Station WEQX-FM, Manchester, Vermont. Northshire challenges staff actions which: (1) denied Northshire's petition to deny and granted the captioned application of Rothschild Broadcasting, Inc. ("RBI") to renew the license of Station WVAY(FM), Wilmington, Vermont, *see Letter from Chief, Audio Services Division to William H. Crispin, Esq.*, Ref. 8900-KK, dated May 5, 1992; and (2) dismissed Northshire's petitions to deny and granted the captioned applications of RBI for new FM translator stations serving Jamaica, Vermont and Marlboro/Jacksonville, Vermont, *see Letter from Chief, Auxiliary Services Branch to RBI*, Ref. 1800B4-AJS, "dated November 6, 1992."[1] We shall deny the Applications for Review for the reasons stated below.

BACKGROUND

2. In 1990, RBI entered into an agreement with Harvest Broadcasting Association ("Harvest") to rebroadcast WVAY's signal on an FM translator station licensed to Harvest, Station W261CE, Arlington, Vermont. As a result, WVAY's signal is rebroadcast on W261CE into Manchester, WEQX-FM's city of license. On March 1, 1991, Northshire filed a petition to deny RBI's license renewal application, alleging that (1) RBI knowingly violated 47 C.F.R. § 74.1232 by providing pre-construction and pre-operation financing for translator station W261CE and becoming the *de facto* owner of that station;[2] and (2) RBI knowingly misrepresented facts to the Commission about the operation and ownership of station W261CE. On October 15, 1991 and on June 12, 1992, Northshire filed petitions to deny RBI's applications for new FM translators serving Jamaica, Vermont and Marlboro/Jacksonville, Vermont, respectively, reiterating its allegations in the WVAY renewal proceeding.

3. By letter dated May 5, 1992, the staff, after full consideration of the allegations therein, denied Northshire's March 1, 1991 petition to deny RBI's renewal application, concluding that there was insufficient evidence to raise a substantial and material question of fact regarding RBI's qualifications. The staff found that RBI had, in fact, made a good faith effort to comply with all applicable Commission rules and policies. Specifically, the May 5 letter concluded that, since the translator was licensed in 1989, RBI reasonably believed in 1990 that the Arlington translator had "commence[d] operation" for purposes of interpreting Section 74.1232(d), *See* note 2, *supra*, even though RBI apparently learned at some point that the translator had not been in operation continually since licensing. Since RBI reasonably believed that the translator had "commence[d] operation" under Section 74.1232(d), the May 5 letter further concluded that RBI's belief that it could provide financial and other support without violating the rule was also reasonable. The May 5 letter also concluded that RBI is not the *de facto* owner of the translator and did not misrepresent itself to the Commission about its ownership and operation. *Id.*[3] The staff's November 6, 1992 letter dismissed Northshire's October 15, 1991 and June 12, 1992 petitions to deny RBI's applications for new translators, finding that the May 5, 1992 letter had already addressed and disposed of all issues raised by Northshire.

4. In its Applications for Review, Northshire essentially reiterates its previous arguments. Additionally, Northshire submits a newspaper article that indicates a Commission employee had publicly questioned the seriousness of

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[1] On June 22, 1992, RBI filed an Opposition to Application for Review.

[2] When RBI entered into the agreement with Harvest in 1990, Section 74.1232(d) then provided:

> An authorization for a commercial FM translator which is intended to provide reception to places which are beyond the predicted 1 mV/m field strength contour of the primary station and within the predicted 1 mV/m field strength contour of another commercial FM radio broadcast station assigned to a different principal community will not be granted to: (1) The licensee or permittee of an FM broadcast station, or (2) An applicant who receives from such FM radio broadcast station licensee or permittee or from any person associated therewith, directly or indirectly, any financial support or contribution toward the costs incurred up to the time such translator commences operation.

47 C.F.R. § 74.1232(d) (1990). Note 2 to this rule explained that only pre-operational financial support was barred. The licensee of the primary station was permitted to contribute to or support ongoing translator operations and maintenance.

[3] The Commission subsequently revised the rule, making it more restrictive, in part to eliminate confusion as to the proper interpretation of the rule. *See* 47 C.F.R. § 74.1232(d) (1991). It is undisputed that the later version does not apply to the analysis of this case.

Northshire's claims shortly after the proceedings were initiated and asserts that a hearing should be held to avoid the appearance of impropriety.

DISCUSSION

5. We agree with the staff that the record in this case contains insufficient evidence to raise a substantial and material question of fact as to RBI's qualifications to be a licensee. Northshire contends that the staff neglected to consider certain "uncontroverted" evidence that RBI violated 47 C.F.R. § 74.1232 and was the "*de facto* " owner of the station. However, the May 5, 1992 letter on its face addresses nearly all of the facts Northshire alleges were ignored.[4] The few facts Northshire§correctly points to as ones the staff did not explicitly address – *i.e.*, phone conversations between RBI's majority shareholder and the manager of the transmitter site for the translator and follow-up letters from the shareholder to the manager – are merely corroborative and do not, in our view, dictate a contrary result from the one reached by the staff. While they indicate that Harvest's translator may well have ceased operating prior to RBI's involvement, they do not undermine RBI's good faith reliance on the translator's status as a licensed facility in treating that facility as "operational" for the purposes of Section 74.1232. Furthermore, while RBI certainly played an active role in assuring that the translator would meet the technical needs of WVAY, and while Harvest may well have been lax in fully meeting its responsibilities as Commission licensee of the translator, the record taken as a whole does not contain sufficient evidence to raise a substantial and material question as to whether RBI intended to and did in fact assert *de facto* control over the translator or misrepresented itself to the Commission about the ownership and operation of W261CE.

6. To the extent that Northshire suggests the appearance of impropriety by the Commission's staff in these proceedings, Northshire has not submitted affidavits from persons with personal knowledge of the facts, as required by 47 U.S.C. § 309(d)(1), but instead relies upon comments reported in a newspaper article. We note initially that submission of the article at this time is procedurally inappropriate, *see* 47 C.F.R. § 1.115(c), and the Commission generally does not recognize newspaper articles as reliable evidence. *See News International, PLC*, 97 FCC 2d 349, 358 (1984). In any event, the newspaper article is, on its face, not probative of any impropriety by the staff. Though the article broadly characterizes a staff member as "dismiss[ing] the seriousness of the complaint," the article more specifically indicates that the staff member provided accurate information as to the licensing status of the translator station and, in addition, quoted the staff member as stating in regard to the allegations, "From a legal standpoint, the attorneys will have to dig into it." In short, contrary to Northshire's view, the article indicates that the staff provided status information only and did not prejudge Northshire's allegations or otherwise act with any impropriety.[5] Finally, Northshire points out that RBI's majority shareholder is the daughter of a former Commission employee and that together they met with Commission staff to determine the licensing status of the translator. It has not, however, specifically alleged or provided any reason for us to conclude that RBI received favoritism by the Commission staff or that other wrong-doing occurred. We do not agree with Northshire that these meetings, in and of themselves, created an appearance of impropriety. The staff routinely meets with applicants and licensees to discuss the status of their various applications or to assist them in understanding the Commission's rules. In sum, we find no basis for reversing the staff's actions.

7. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's rules, the Applications for Review filed on June 4, 1992 and December 7, 1992 by Northshire Communications, Inc. ARE DENIED.[6]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[4] Contrary to Northshire's argument, the letter clearly discusses RBI's negotiation of a site lease with the site owner and a sub-lease with Harvest, RBI's primary liability under the lease for the operational expenses of the translator, the lack of a prior written site lease for Harvest, and Northshire's allegation that the translator was not operational before 1990. Additionally, Northshire argues that the staff ignored deposition testimony of Brian Dodge, Fred Harvey, and Robin Rothschild, which, according to Northshire, fully supports its claim that RBI, not Harvest, is the *de facto* owner of the translator station. To the contrary, however, the staff's analysis thoroughly considered and cited extensively to the deposition testimony of Brian Dodge, Fred Harvey, and Robin Rothschild. It nonetheless concluded that a substantial and material question of fact had not been raised concerning *de facto* ownership of the translator. *See, e.g., Letter from Chief, Audio Services Division to William H. Cri spin, Esq.*, at p. 4-8.

[5] The quoted statements were not attributed to any Commission "decision-making personnel" as defined by 47 C.F.R. §1.1202(c), but rather to a staff engineer who had no responsibility for the ultimate finding *vis - a - vis* the propriety of the translator's operation.

[6] We have serious concerns regarding Harvest's operation of W261CE and its failure to keep the Commission informed concerning the station's status. However, we will address that issue in a separate proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

1310, Inc.
(Assignor)

and File No. BAL-941128EB

Pacific FM, Inc.
(Assignee)

For Assignment of License of
KDIA(AM), Oakland, California

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 1995; Released: June 29, 1995

By the Commission:

1. The Commission has before it the above-captioned application for assignment of the license of KDIA(AM), Oakland, California, from 1310, Inc., to Pacific FM, Inc. ("Pacific"). The application includes a related request for waiver of 47 C.F.R. §73.3555(c), the Commission's one-to-a-market rule.[1] Pacific is also the licensee of KOFY(AM), San Mateo, California and UHF television station KOFY-TV, Channel 20, San Francisco, California. Because the Grade A contour of KOFY-TV encompasses all of Oakland, grant of the above-captioned application requires waiver of the one-to-a-market rule.[2] *In re Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules ("Second Report and Order")*, 4 FCC Rcd 1741 (1989), *recon. granted in part and denied in part ("Second Report and Order Recon.")*, 4 FCC Rcd 6489 (1989). On December 27, 1994, Alfred Williamson filed an informal objection to the grant of the subject application. However, Mr. Williamson has filed a request to withdraw his objection, and acknowledges that certain factual allegations made in his objection were incorrect. Additionally, both Mr. Williamson and the parties to the application have submitted affidavits pursuant to 47 C.F.R. § 73.3588 stating that no money or other consideration in excess of legitimate and prudent expenses has been or will be paid for the withdrawal of the objection. In this regard, we note that Mr. Williamson will participate in the station's ascertainment efforts by providing input into the station's programming format. Nevertheless, Mr. Williamson will not be paid for this participation, and thus the withdrawal of the objection complies with the provisions of Section 73.3588 and the Commission's policies governing citizens agreements. *See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3913 (1990). Accordingly, Mr. Williamson's request will be granted herein and the informal objection will be dismissed.

2. Pacific bases its waiver request on the one-to-a-market waiver standards adopted in the *Second Report and Order*. Under these criteria, the Commission presumptively favors waiver requests involving station combinations serving the top 25 markets where there are at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed combination ("top 25 market/30 voice standard"). *See* 47 C.F.R. §73.3555, n.7 . It also favors requests involving "failed" broadcast stations, that is, stations that have not been operating for a substantial period of time, *e.g.*, four months, or that are involved in bankruptcy proceedings. *Id.* Other waiver requests are evaluated on a more rigorous case-by-case basis, as set forth in the *Second Report and Order*. While Pacific's waiver request meets the top 25 market/30 voice standard,[3] it nevertheless must be reviewed under the case-by-case standard because, as noted, the proposed assignment of license also invokes local radio ownership limits.[4] Under this standard, the Commission makes a public interest determination based upon the following criteria: (1) the potential public service benefits of joint operation of the facilities such as the economies of scale, cost savings and programming and service benefits; (2) the types of facilities involved; (3) the number of media outlets owned by the applicant in the relevant market; (4) the financial difficulties of the stations involved; and (5) the nature of the relevant market in light of the level of competition and diversity after the joint operation is implemented. *See Second Report and Order*, 4 FCC Rcd at 1753.

3. In support of its waiver request, Pacific submits a

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[1] Section 73.3555(c) of the Commission's rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a commonly-owned television station, or, conversely, if the Grade A contour of a television station encompasses the entire community of license of a commonly-owned AM or FM station. *See* 47 C.F.R. §73.3555(c).

[2] Because the principal community contours of KOFY(AM) and KDIA(AM) overlap, Pacific must also meet the requirements of the radio ownership rule found in Section 73.3555(a) of the Commission's rules. *See* 47 C.F.R. §73.3555(a)(1). Pacific certifies that there are at least 15 radio stations whose contours overlap the contours of the proposed commonly-owned stations. Because over 50 percent of principal community contour overlap of same service stations KOFY(AM) and KDIA(AM) occurs within the San Francisco, California radio metro market, as defined by Arbitron, Inc., Pacific supplies audience share data from the most recent Arbitron survey available from that market at the time the instant application was filed. *See* 47 C.F.R. §73.3555(a)(3)(iii). Those data show that the combined audience share of KOFY(AM) and KDIA(AM) in the metro market is 1.7 percent, and therefore below the 25 percent audience share limit set forth in the rule.

[3] As set forth in paragraph 8, *infra*, the San Francisco media market is the country's fifth largest and will contain 52 separate broadcast "voices" following Pacific's proposed acquisition of KDIA(AM).

[4] *See In re Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6394, n.40 (1992); *see also Moosey Communications, In c.*, 8 FCC Rcd 5247 (1993)(consideration of one-to-a-market waivers under the case-by-case standard still appropriate where new

showing that addresses each of the five case-by-case factors.[5] Pacific first contends that the joint operation of KDIA(AM), KOFY(AM) and KOFY-TV will enhance the efficiencies evidenced since KOFY(AM) and KOFY-TV began joint operation in 1986. In this regard, Pacific anticipates that the proposed combination will create greater operating efficiencies by allowing the stations to combine certain personnel functions and to share professional service providers, including engineers, administrators, attorneys and accountants. Additionally, Pacific intends to generate further cost savings from the joint purchase of supplies, from joint payment for music licenses and news wire services, by combining marketing and research departments, and by sharing newsgathering facilities. Specifically, Pacific estimates that consolidation of staff, including the chief engineer, traffic manager, sales manager, promotions department, general manager, and accounting, and consolidating the stations' traffic department would result in savings of $207,600 annually. Pacific estimates additional annual savings of $26,000 through joint purchasing and cross-promotion. Pacific further maintains thatthe proposed station combination will allow consolidation of its stations' facilities, reducing rent and utility expenses by approximately $88,800 per year. In sum, Pacific estimates that joint operation of the stations will generate cost savings of $332,400 annually. Pacific asserts that the savings attributable to joint operation of the stations then will be used to improve the stations' facilities and to enhance program quality. Specifically, Pacific notes that the consolidation of the stations will allow KDIA(AM) to have access to the Associated Press wire service, affording the station an additional important newsgathering source. Also, Pacific states that cost savings achieved by combining the stations' operations will allow for the employment of a full-time public affairs director for the stations. The public affairs director will develop a department focused on the needs and interests of the local communities served by the stations. Pacific further states that none of the three stations, standing alone, would be able to provide this level of public affairs services to their communities of license. Additionally, Pacific contends that combining the stations' operations will allow for cross-promotion of the stations, so that more public affairs programming will be broadcast on KDIA(AM). Pacific also has plans for a "Community Access Van," to be used as a roving studio that will visit local neighborhoods, providing KDIA(AM)'s listeners with the opportunity to express their views and opinions. Programming on KDIA(AM) will be further enhanced, Pacific argues, because its policy is to provide broadcast time to residents of the stations' communities of license providing them with an opportunity to express their opinions in a "free speech message" broadcast by the station.

4. Second, regarding the technical facilities involved, Pacific affirms that KOFY-TV is a UHF television station operating on Channel 20 with 3,470 kW effective radiated power ("ERP"), visual and 347 kW ERP aural and an antenna height of 1550 feet above average terrain ("HAAT"). KOFY(AM) is a Class B AM station, presently operating on 1050 kHz with a daytime power of 50 kW and a nighttime power of 10 kW using a directional antenna. KDIA(AM) is a Class B AM station operating full time on 1310 kHz with a power of 5 kW, using a full-time directional antenna. Additionally, Pacific asserts that the radio and television stations it proposes to co-own do not have the ability to dominate the market based on their facilities. Specifically, Pacific states that there are six Class A stations and nineteen other Class B stations licensed to the market that have coverage capability equal to or greater than KDIA(AM) and KOFY(AM). With regard to the facilities of KOFY-TV, Pacific states that KOFY-TV is affiliated with the new Warner Brothers Network, and that the market includes seven VHF and 16 other UHF television stations. All of the UHF stations, Pacific notes, are of relatively equal power. Among all these television stations, there are six network affiliates, twelve independent stations, and five educational stations.

5. Third, with respect to the number of other media outlets the applicant already owns in the relevant market, Pacific affirms it does not own any broadcast stations in the San Francisco market other than KOFY-TV and KOFY(AM). As previously noted, Pacific demonstrates that for purposes of the Commission's local radio ownership rule, there are at least 15 radio stations whose contours overlap the proposed commonly-owned radio stations and that the combined audience share of KOFY(AM) and KDIA(AM) in the San Francisco Arbitron metro market is 1.7 percent. *See* note 3, *supra.*

6. Fourth, with regard to the economic status of the stations involved in the proposed combination, Pacific predicts that KDIA(AM) will soon be insolvent unless the proposed combination is permitted because it is no longer economically feasible for KDIA(AM) to continue to operate as a stand-alone AM station. In this regard, Pacific states that for the eleven months ending in November 1994, KDIA(AM) experienced a net operating loss of approximately $130,000 and relied heavily on a credit line to meet expenses and pay off debts. Additionally, KDIA(AM)'s accumulated losses (negative retained earnings) now exceed a quarter of a million dollars. Pacific also points to the public service benefits it has already realized by combining the operations of KOFY(AM) with KOFY-TV. At the time that Pacific acquired KOFY(AM), the station was a daytime only facility and was losing money. Additionally, Pacific reports that KOFY-TV was also financially compromised prior to combining with KOFY(AM). However, based on the efficiencies achieved through joint operation of the AM/UHF-TV combination, KOFY(AM) now operates fulltime, with improved facilities, and is financially stable, and KOFY-TV has been able to avoid bankruptcy. Pacific contends that the addition of KDIA(AM) to this combination will further strengthen all three stations.

7. The fifth factor relates to the nature of the relevant market in light of the Commission's concerns about diversity and competition. Relevant indicia include the number of broadcast outlets, the number of separately-owned and operated "voices" in the market, and the presence of cable and non-broadcast media. As to the number of broadcast stations, the Commission has held that, in the context of a one-to-a-market waiver, it will consider the "relevant TV metro market for radio stations and the relevant ADI [Area of Dominant Influence] TV market for TV stations." *See Second Report and Order,* 4 FCC Rcd at 1760, n. 101.

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radio-TV combinations are created, pending the possible revision of the one-to-a-market rule in the outstanding TV ownership proceeding in MM Docket 91-221).

[5] It should also be noted that "[n]ot all of the factors mentioned will be relevant in every case." *See Second Report and Order Recon.,* 4 FCC Rcd at 6491.

Pacific represents that the San Francisco-Oakland-San Jose television ADI is ranked 5th in the country and currently contains 53 separately owned and operated broadcast "voices." Following the proposed combination, there will be 52 separate "voices" licensed to the market. Additionally, Pacific asserts that there are four major daily newspapers and nine weekly newspapers, as well as operating cable systems with an aggregate cable penetration of 67 percent. Furthermore, Pacific notes that KOFY(AM) presently offers programming targeted for Hispanic audiences, while KDIA(AM) will offer programming targeted for Black audiences, and therefore, the stations' market shares reflect distinct and not duplicative audiences.

8. *Discussion.* In evaluating a request for waiver of the one-to-a-market rule, the Commission's goal "is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market areas involved." *See Second Report and Order Recon.*, 4 FCC Rcd at 6491. We conclude that Pacific's showing in support of a waiver of the one-to-a-market rules meets the Commission's case-by-case criteria, and that a waiver in this instance is consistent with the public interest and would not have an adverse effect on diversity and competition in the San Francisco market.[6] Pacific has shown that joint operation of KDIA(AM), KOFY(AM), and KOFY-TV will create efficiencies resulting in significant cost savings and the potential for enhanced programming and service benefits. In particular, Pacific has specifically related the cost savings it would realize from these efficiencies to increased programming and services responsive to community needs of both the AM and TV stations. In this regard, all the stations will have a public affairs director, and KDIA(AM) will have access to newsgathering facilities it previously lacked. Additionally, KDIA(AM) will have access to cross-promotion now in place for KOFY(AM) and KOFY-TV. In this regard, KDIA(AM) will be able to broadcast more public affairs programming, enabling KDIA(AM) to better serve its community. Pacific also affirms that the proposed combination enhances prospects for profitable operation on KDIA(AM), which Pacific notes has incurred operating losses during the past year under its present ownership. Moreover, Pacific demonstrates that the proposed combination will not create any undue concentration of ownership or control of the broadcast media in the San Francisco market, which comprises the country's fifth largest ADI. Following the proposed acquisition of KDIA(AM), the market will be served by 58 radio stations and at least 21 television stations. Those 79 broadcast outlets will be owned and operated by 52 separate entities. *See, e.g., First Broadcasting Company*, 10 FCC Rcd 2904, 2906 (1995). Other "voices" in the market include at least four major daily newspapers and cable television, which has a penetration rate of 67 percent. Although the technical facilities of KOFY(AM) and KDIA(AM) are not insignificant, the proposed combination involves a less powerful UHF station, KOFY-TV. The Commission has acknowledged that combinations involving UHF television stations may provide relatively greater public interest benefits and impose relatively fewer public interest costs. *See Second Report and Order*, 4 FCC Rcd at 1753. Furthermore, we find that the proposed combination does not present issues of market concentration inconsistent with the public interest given the highly competitive environment in the San Francisco market, both in terms of number of other broadcast stations and the relevant market shares of the stations involved in this transaction.[7] Thus, we are persuaded that the public benefits of common ownership and joint operation of KOFY-TV, KOFY(AM), and KDIA(AM) outweigh any negative effect on diversity and competition in the San Francisco market that the combination might engender. The Commission has granted waivers of the one-to-a-market rule under similar circumstances.[8]

9. Accordingly, IT IS ORDERED, That the request for a waiver of the Commission's one-to-a-market rule, 47 C.F.R. §73.3555(c), IS HEREBY GRANTED, and, having found the parties thereto otherwise qualified, the application for assignment of license (BAL-941128EB) of KDIA(AM), Oakland, California, from 1310, Inc. to Pacific FM, Inc. IS HEREBY GRANTED. IT IS FURTHER ORDERED That the request for withdrawal of the informal objection to grant of the above-captioned application, filed on February 27, 1995 by Alfred Williamson, IS HEREBY GRANTED and the informal objection is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] Our conclusion takes into account the public interest in a strengthened radio service made possible by waiver of the one-to-a-market rule in this case. *See Revision of Radio Rules and Policies*, 7 FCC Rcd at 6394, n.40.

[7] There is substantial competition in the San Francisco market. As documented by Pacific, in the Summer 1994 Arbitron Local Market Report for the San Francisco survey area, KOFY(AM) was ranked fifteenth, with a .9 share and KDIA(AM) was tied for a ranking of sixteenth with a .8 share. *See, e.g., KVI, Inc.*, 9 FCC Rcd 1330, 1331-1332 n.8 (1994) (substantial competition found in Seattle market where radio stations to be co-owned with a television station as a result of a one-to-a-market waiver ranked sixth with a 4.9 share, seventh with a 4.5 share, and thirteenth with a 3.1 share).

[8] The Commission recently granted a one-to-a-market rule waiver under the case-by-case standard and a related application for assignment of the license of KSFO(AM), San Francisco. *See First Broadcasting Company*, 10 FCC Rcd 2904 (1995). The Commission has also granted one-to-a-market rule waivers in other markets to permit radio-television acquisitions under the case-by-case standard. *See, e.g., KVI(AM)*, 9 FCC Rcd 1330 (1994); *Brem Broadcasting*, 9 FCC Rcd 1333 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Fayetteville-Cumberland Telecasters, Inc., Debtor-in-Possession — File No. BPCT-940805KF

To Modify the Authorized Facilities of WFAY(TV), Fayetteville, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1995; Released: June 29, 1995

By the Commission: Commissioner Barrett concurred and issued a separate statement.

1. The Commission has before it for consideration the unopposed application of Fayetteville-Cumberland Telecasters, Inc., Debtor-in-Possession ("Cumberland") to modify the facilities and increase the power of presently operating station WFAY(TV), Channel 62 (Fox), Fayetteville, North Carolina. Cumberland contemplates retaining the current directional antenna system, while increasing the effective radiated power from 339 kW to 946 kW and reducing the average height above average terrain (HAAT) from 259 to 256 meters. Because the proposed modification will expand the Grade B contour of WFAY(TV) such that it overlaps with the Grade B contours of stations WGGT(TV), Channel 48 (Fox), Greensboro, North Carolina and WSFX-TV, Channel 26 (Fox), Wilmington, North Carolina, which are under common control, Cumberland requests a waiver of the Commission's duopoly rule, 47 CFR § 73.3555(b).

2. In support of its request for a waiver, Cumberland has submitted an engineering study demonstrating that the Grade B contour overlap between WFAY(TV) and WGGT(TV) encompasses an area of 174.5 square kilometers and a population of 8,635. The overlap represents 1.5% of the population and 1.6% of the service area of WFAY(TV) and 1.5% of the population and .77% of the service area of WGGT(TV). The Grade B contour overlap between WFAY(TV) and WSFX-TV encompasses an area of 161.7 square kilometers and a population of 5,669. This overlap represents .96% of the population and 1.5% of the service area of WFAY(TV) and 1.3% of the population and .76% of the service area of WSFX-TV. Cumberland also states that the overlap areas are primarily farmland.

3. Cumberland states that the purpose of the power increase is not to expand the coverage area of WFAY(TV), but to improve reception within its authorized service area. The signal quality and viewer reception of WFAY(TV) have allegedly been poor since the station was licensed in 1985. Cumberland claims this problem has led to viewer, advertiser and cable operator complaints, even in Fayetteville, the city of license, which has one other commercial television station. Cumberland represents it has tried several remedies to improve the quality of WFAY's signal at the cable headends, including supplying state-of-the-art antennas specifically tuned to Channel 62. Cumberland also states that its previous attempts at improving the WFAY(TV) signal have been unsuccessful and, because of the existence of nearby Fort Bragg and Pope Air Force Base, its tower height cannot be increased. Operating WFAY(TV) as a debtor-in-possession since October 1, 1992, Cumberland further contends its depressed advertising sales, which it links to poor signal quality, have prevented the station from becoming financially solvent. It now concludes that the only remaining viable option is to increase the station's power. The power increase proposed in the application is, Cumberland submits, the minimum increase necessary to deliver a crisp, static-free picture to cable operators and to the public in its city of license and the immediately surrounding areas.

4. Cumberland also claims that the two areas which will be affected by the proposed power increase are served by several additional off-the-air stations. The Grade B contours of nine other commercial television stations fully encompass the WGGT(TV)-WFAY(TV) overlap.[1] Similarly, the Grade B contours of five commercial television stations entirely encompass the WSFX-TV-WFAY(TV) overlap area.[2] Cumberland further asserts that the affected areas are also served by cable systems and satellite dishes.

5. Finally, Cumberland asserts that the stations serve separate market areas and are distinct business entities. According to Cumberland, station WFAY(TV) is listed by Arbitron in the Raleigh-Durham Area of Dominant Influence (ADI) with a ranking of 32, whereas WGGT(TV) is in the Greensboro-Winston Salem-High Point ADI which has a ranking of 49. In contrast, station WSFX-TV is in the Wilmington ADI which carries a ranking of 142. Cumberland also claims that the two areas of overlap linking the three stations are virtually all farmland and allegedly have no potential advertising clients. Cumberland further states that the day-to-day management responsibilities of WSFX-TV rest with General Manager Robert T. Watts and WSFX-TV has no employees in common with either of the other stations. Cumberland represents that stations WFAY(TV) and WGGT(TV) share a General Manager, James Thrash, but have no common events, programs or other personnel. Cumberland also represents that station WGGT(TV) operates under a time brokerage agreement with WNRW(TV), Winston-Salem, North Carolina, which programs nearly all of WGGT(TV)'s broadcast hours. Cumberland concludes that the variance in market prominence and the geographic distance between the stations diminishes any individual station's incentive to sell out-of-market advertising.

[1] The overlap area is also partially covered by the Grade B contours of three other stations.

[2] The overlap area is also partially covered by the Grade B contour of one additional station.

DISCUSSION

6. The ultimate objective of the duopoly rule, as well as of the other multiple ownership rules, is to promote maximum diversification of program and service viewpoints and to prevent an undue concentration of economic power contrary to the public interest. *Multiple Ownership Rules*, 22 FCC 2d 306, 307, (1970), *recon. granted in part*, 28 FCC 2d 662 (1971). However, the Commission has allowed common ownership of stations with overlapping Grade B contours in two circumstances: where the signal overlap is *de minimis*, or where the public interest benefits to be gained from waiving the rule outweigh any detrimental effects resulting from the overlap. *H & C Communications*, 9 FCC Rcd 144, 145 (1993). The relevant public interest factors include: (1) the number of media voices in the overlap area; (2) the distinctiveness of the respective markets; (3) the independence of the stations' operations with regard to programming and advertising; and (4) the concentration of economic power. *Id* at 146. As public interest considerations, the Commission has also weighed the opportunity for programming enhancement, and the financial viability of the stations at issue. *Id.* and *Taft Broadcasting*, 7 FCC Rcd 2854, 2855 (1992).

7. Commission precedent has generally characterized the *de minimis* standard as an overlap area representing less than 1% of both the area and population of the Grade B contour of each station. *Hubbard Broadcasting*, 2 FCC Rcd 7374 (1987). The instant application falls short of this standard. The population and service area overlap of station WGGT(TV) with WFAY(TV) both exceed the 1% maximum. Similarly, the population overlap of WFAY(TV) with WGGT(TV), the service area overlap of WSFX-TV with WFAY(TV) and the population area overlap of WFAY(TV) with WSFX-TV each exceed 1%. Though the degree of overlap is not *de minimis*, its modest size (1.6% or less in area and population), combined with the facts as represented by the applicant and the dissimilarity and independence of the markets involved, provide grounds for a waiver of the duopoly rule in this situation. As an initial matter, the proposed overlap is well within the range approved in our past waiver cases. *See, e.g. H & C Communications, supra* (area overlap of 2.6% and 3.3% and population overlap of 1% and .8%) and *Citadel Communications Company, Ltd.*, 8 FCC Rcd 855 (1993) (area overlap of 11.3% and 10.7% and population overlap of 3.1% and 4.3%). Additionally, the potential overlap is not so large as to require a finding that WFAY(TV), "serves substantially the same area" as television stations WGGT(TV) and WSFX-TV. *Taft* at 2855.

8. Further, each overlap area receives at least five off-the-air commercial television stations, with the WGGT(TV)-WFAY(TV) overlap area receiving as many as nine additional commercial television signals. The affected broadcast markets are separate and distinct and the individual stations are structured to operate virtually as separate entities. Station WSFX-TV has its own general manager and, though stations WFAY(TV) and WGGT(TV) share a general manger, the licensee represents that all three stations have separate personnel and host no common events or programs. Additionally, because of the distance between markets, and because the signal overlaps are small and confined to predominately rural areas, it appears that sales opportunities do not exist in the other stations' service areas. Moreover, the availability of numerous separate voices in each of the overlap areas, as well as the presence of an additional television station in Fayetteville, reduces the opportunity for Cumberland to exercise undue concentration of economic power.

9. Finally, WFAY(TV)'s financial status presents a further basis for grant of this waiver. *See, e.g., Taft, supra* at 2855. For over two and one half years, WFAY(TV) has been, and is still, operating as a debtor-in-possession. The stated reluctance of potential advertisers to place advertisements with WFAY(TV) will likely persist while the station's broadcast signal remains weak, as unclear reception discourages viewing and prevents the station from reaching the widest possible audience.

10. Upon consideration of the arguments presented, we believe that any detriment realized by creation of the overlap would be outweighed by the public interest benefits generated by the proposed facility modifications. A stronger signal could enhance local broadcast service to the Fayetteville, North Carolina community. An improved signal could also better WFAY(TV)'s chances to attract advertisers and could lead to a reversal of the station's tenuous financial position. The overlap will affect small, sparsely populated areas that receive numerous television signals and, thus, will have no undue effect on competition. We find that grant of a permanent waiver of the duopoly rule, under the circumstances presented and based on the representations made herein, will inure to the public interest. Having determined that the applicant is qualified in all respects, we conclude that grant of the instant application would serve the public interest, convenience and necessity.

11. Accordingly, IT IS ORDERED, That the request for permanent waiver of the Commission's duopoly rule, 47 CFR § 73.3555(b), is GRANTED and that the application to modify the authorized facilities of station WFAY(TV) filed by Fayetteville-Cumberland Telecasters, Inc., Debtor-in-Possession (BPCT-940805KF) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: In re Application of Fayetteville-Cumberland Telecasters, Inc., Debtor-in-Possession, to Modify the Authorized Facilities of WFAY(TV), Fayetteville, North Carolina (Memorandum Opinion and Order)

In this Memorandum Opinion and Order the Commission grants Fayetteville-Cumberland Telecasters, Inc., Debtor-in-Possession ("Cumberland"), permission to modify the facilities and increase the power of station WFAY(TV), Channel 62 (Fox), Fayetteville, North Carolina. While approving the modification, the Commission has granted a de minimis waiver of the Commission's duopoly rule. As such, I concur in this decision.

I have previously expressed my concern about modifying of the Commission's Rules by way of waiver.[1] As a result of today's decision, I now reiterate my concern. In this proceeding Cumberland requests a waiver of the Commission's duopoly rule, 47 C.F.R. s73.3555(b). The duopoly rule exists to promote maximum diversification of program and service viewpoints and to prevent an undue concentration of economic power contrary to the public interest.[2] In my opinion, it is imperative that the Commission recognize that waiver actions, which serve to relax our ownership regulations, become a means by which the Commission circumvents its rulemaking proceeding. Though I remain concerned about the Commission's continued willingness to, in effect, modify its local ownership rules through the waiver process, I concur in today's decision.

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[1] See Pegasus Broadcasting, 7 FCC Rcd 8625 (1992) (Dissenting Statement of Commissioner Andrew C. Barrett). See also In re: ACT III Broadcasting of Buffalo, 8 FCC Rcd 885 (1993) (Dissenting Statement of Commissioner Andrew C. Barrett); Sunshine Television, Inc., 8 FCC Rcd 4428 (1993) (Statement of Commissioner Andrew C. Barrett - Concurring in Part); H&C Communications, Inc., 73 RR2d 1108 (1993) (Concurring Statement of Andrew C. Barrett); WOI-TV, 9 FCC Rcd 481 (1993) (Concurring Statement of Commissioner Andrew C. Barrett); In re Application of Salt of the Earth Broadcasting, Ltd., 9 FCC Rcd 3621(1994) (Concurring Statement of Commissioner Andrew C. Barrett); In re Application of Sam Jones, Jr., FCC Rcd (1995) (Concurring Statement of Commissioner Andrew C. Barrett).

[2] see Multiple Ownership Rules, 22 FCC 2d 306,307 (1970), recon. granted in part, 28 FCC 2d 662 (1971).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-103

In the Matter of

Amendment of Section 73.202(b), RM-8659
Table of Allotments,
FM Broadcast Stations.
(Wyeville, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 23, 1995; Released: June 30, 1995

Comment Date: August 21, 1995
Reply Comment Date: September 5, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Josephine Miracle ("petitioner"), requesting the allotment of Channel 267A to Wyeville, Wisconsin, as that community's first local broadcast service. Petitioner submitted an engineering analysis in support of the proposal and states her intention to apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a first local service to Wyeville, Wisconsin. A staff engineering analysis indicates Channel 267A can be allotted to Wyeville consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 8.7 kilometers (5.4 miles) east of the community.[1] The site restriction will prevent a short spacing to the allotment site for Channel 266C3, Station KHME, Winona, Minnesota.[2]

3. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "... among the several states and communities." The Commission has defined "communities" as geographically identifiable population groups. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community facts, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. *See, e.g., Oak Grove, FL*, 5 FCC Rcd 3774 (1990); *Hannibal, OH*, 5 FCC Rcd 3315 (1990); and *Statenville, GA*, 5 FCC Rcd 2685 (1990). We do recognize that Wyeville is incorporated and listed in the census, meeting the basic criteria for community status.[3] However, we may find that a population grouping of 154 people does not constitute a community for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as a library, schools, shopping centers, churches, a newspaper and social or civic organizations and some form of government. *See Searles Valey, CA*, 3 FCC Rcd 5221 (1988); *see also, Naples, FL*, 41 RR ed 1549 (1977). Therefore, petitioner is requested to submit information regarding Wyeville to demonstrate whether it has any commercial establishments, social, economic, cultural or religious organizations, municipal services, or governmental units that identify themselves specifically with Wyeville.[4]

4. In view of the fact that the proposed allotment would provide a first local service to Wyeville, the Commission believes it would serve the public interest to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Wyeville, Wisconsin	---	267A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 21, 1995**, and reply comments on or before **September 5, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Josephine Miracle
206 East 19th Street
Lockport, Illinois 60441

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the*

[1] The coordinates for Channel 267A at Wyeville are 44-01-39 and 90-16-35.

[2] Station KHME is currently licensed as a Class A facility. The licensee has filed under the one-step upgrade process as a 73.215 applicant for Channel 266C3.

[3] The *1995 Rand McNally Atlas* indicates the postal facility in Tomah, Wisconsin, serves Wyeville. Tomah has a 1990 Census population of 7,570 people and is located approximately seven miles from Wyeville. Wyeville and Tomah are both located in Monroe County as is the Ft. McCoy military reservation.

[4] It is always in the commenters' best interest to present the Commission with supporting evidence during the rule making process. Timely disclosure ensures that all information will be considered in the deliberations before an allotment is granted or denied.

Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable — CUID Nos. FL0164 (Cocoa Beach, FL), FL0361 (Citrus County, FL), FL0995 (Citrus County, FL)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 20, 1995; Released: June 30, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are equal to or lower than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Missouri, Inc. — CUID No. MO0179 (St. Peters)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1995; Released: June 30, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Florida, Inc. — CUID No. FL0617 (Key Largo)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1995; Released: June 30, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Florida, Inc. CUID No. FL0366 (Little Torch Key)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1995; Released: June 30, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: July 3, 1995

COPPER VALLEY TELEPHONE COOPERATIVE, INC. FILED A PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36 APPENDIX-GLOSSARY OF THE COMMISSION'S RULES
AAD 95-71

Comment Date: August 14, 1995
Reply Date: August 28, 1995

On May 10, 1995, Copper Valley Telephone Cooperative, Inc. ("Copper Valley") filed a petition for waiver of the definition of "Study Area" as set forth in Part 36 Appendix-Glossary of the Commission's rules. This waiver would allow Copper Valley to reflect the changes in its study area boundaries that would result from the incorporation of the previously unserved rural areas in and around McCarthy, Alaska into its existing Alaska study area. Copper Valley states that the Alaska Public Utilities Commission has approved its request to provide service to the unserved area.

Interested parties may file comments on this petition on or before **August 14, 1995**, and reply comments on or before **August 28, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should also reference AAD 95-71. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Accounting and audits Division, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for the purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

New England Television, Inc.
(Assignor)

and File No. BALCT-940107KG

Boston University Communications, Inc.
(Assignee)

For Assignment of License of
Station WNHT-TV, Channel 21,
Concord, New Hampshire

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1995; Released: July 3, 1995

1. The Commission has before it for consideration an application to assign the license of station WNHT-TV, Channel 21, Concord, New Hampshire, from New England Television, Inc. (NETV) to Boston University Communications, Inc. (BUCI).[1] Informal objections to the assignment application were filed by Paugus Television, Inc. (Paugus), licensee of station WGOT-TV, Channel 60, Manchester, New Hampshire, and by CTV of Derry, Inc. (CTV), licensee of station WNDS-TV, Channel 50, Derry, New Hampshire. The parties have filed various opposition and responsive pleadings.

2. BUCI, the assignee, is the licensee of WABU-TV, Boston, Massachusetts, and the acquisition of the license of WNHT-TV will result in the overlap of the predicted Grade B contours of the two stations. However, BUCI proposes to operate WNHT-TV as a satellite of WABU-TV, pursuant to the satellite exception to the multiple ownership rule set forth in Note 5 to Section 73.3555 of the Commission's Rules.[2]

3. Under our satellite policy, *see Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (petitions for partial stay and reconsideration pending),[3] an applicant for television satellite status is entitled to a presumption that the proposed satellite operation is in the public interest if it meets three criteria: (1) there is no City Grade contour overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station. *Id.* at 4213-4214. An opposing party may rebut the presumption by demonstrating that grant of the satellite application is not in the public interest. The Commission will view favorably applications that qualify for the presumption and are unrebutted by an opposing party. *Id.* at 4214. For the reasons set forth below, we find that the proposed operation of WNHT-TV as a satellite is consistent with our policy.

4. With regard to the first criterion of the presumption, the applicant has submitted an engineering study which demonstrates that the City Grade contours of WNHT-TV and WABU-TV will not overlap.[4] Thus, the satellite proposal meets the first component of the presumption.

5. With respect to the second criterion, the applicant has demonstrated that the area is underserved using one of our two tests. The first is a "transmission test," which defines as "underserved" an area with two or fewer full-service stations licensed to the community.[5] The applicant has shown that WNHT-TV is the only full-service television station licensed to Concord, New Hampshire. Accordingly, the applicant's proposal meets the second criterion for the satellite presumption.

6. Finally, as to the third criterion to qualify for the presumption, the applicant must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the television station as a full-service station. The applicant has submitted the declaration of Wilson Hickam, President of NETV, which states that he has received no solicitations to purchase or invest in the station. Prior to the agreement with BUCI, Mr. Hickam negotiated with Television Marketing Company, Montclair, Virginia, for two months regarding the sale of the station, but to no avail. In addition, Mr. Hickam listed the station with: (1) Thomas J. Shields and Company, a Boston brokerage company; (2) Community Equity Associates, a media brokerage firm of New York and Tampa; (3) the Communications Division of the Bank of Boston; and (4) the Communications Division of Fleet Credit Corporation in Providence, Rhode Island. After eighteen months, none of these efforts attracted investors in or buyers of WNHT-TV. Based on the information provided, we believe that NETV has adequately demonstrated the unlikelihood of finding an alternative buyer ready and able to operate the station on a stand-alone basis. See *P.P.D. & G., Inc.*, 8 FCC

[1] Station WNHT-TV has been off the air since March 22, 1989.

[2] A station that obtains and rebroadcasts all of its programming from its parent is referred to as a "100% satellite," whereas a satellite station that originates some local programming is referred to as "primarily a satellite" station. *See Amaturo Group, Inc.*, 68 FCC 2d 899, 900 (1978); *Television Satellite Stations*, 6 FCC Rcd 4212 (1991).

[3] We note that there is an outstanding proceeding concerning television satellite stations, which invites comment on whether television satellites should be exempted from the 12-station limit set out in the multiple ownership rules. *Second Further Notice of Proposed Rulemaking* in MM Docket No. 87-8, 6 FCC Rcd 5010 (1991). *See also Further Notice of Proposed Rulemaking* in MM Docket Nos. 91-221 and 87-8, FCC 94-322, released January 17, 1995. Grant of the application before us would not in any event implicate the 12-station rule.

[4] Some City Grade overlap of the contours currently exists, which the applicant's original technical statement calculated to be nine square kilometers. However, BUCI submitted a revised technical statement proposing a reduction in antenna height which will eliminate all City Grade contour overlap. *See* para. 9, *infra*.

[5] We have also defined an "underserved area" in terms of a "reception test," but that test is not material here. *See Television Satellite Stations*, 6 FCC Rcd at 4215.

Rcd 8229 (1993). Thus, we believe the applicant has satisfied the third criterion and that its proposal is entitled to a presumption that it will serve the public interest.

INFORMAL OBJECTIONS

7. In its informal objection, Paugus alleges that the City Grade contours of WNHT-TV and WABU-TV have much greater overlap than nine square kilometers and that the applicants' original technical showing was incorrect and misleading. In support thereof, Paugus submits one of WNHT's promotional maps on which it drew "what it believes the true city grade contour overlap will be based on the TV Fact Book maps." Similarly, the informal objection filed by CTV points to the amount of overlap of the Grade A and Grade B contours of WNHT-TV and WABU-TV. CTV alleges that this large amount of overlap violates the spirit of the Commission's satellite policy because WABU-TV is also the proposed parent of satellite station WCVX-TV, Vineyard Haven, Massachusetts.[6] According to CTV, the additional acquisition of satellite WNHT-TV would unfairly allow BUCI to dominate the market with approximately 50% of the WABU-TV Grade B contour overlapping the other two commonly-owned stations.

8. In opposition to Paugus' allegation, the applicants argue that the engineering statements prepared by their consulting engineers, du Treil, Lundin and Rackley, Inc., show without question the correct contours of WNHT-TV and of WABU-TV. They state that the calculations were done in accordance with accepted and documented technical practices, and that the promotion coverage map submitted by Paugus is not technically precise. Regarding the allegation by CTV that the amount of Grade A and Grade B overlap violates the spirit of the satellite policy, the applicants argue that such overlap is irrelevant, so long as they have made the requisite showing to operate primarily as a satellite station.

9. The original satellite proposal submitted by the applicant did depict that the City Grade contours of WNHT-TV and WABU-TV overlapped.[7] Subsequently, however, WNHT-TV was required by the new owner of its transmission tower to relocate its antenna to a side-mounted position. As a result of this change, WNHT-TV's City Grade contour no longer overlaps the City Grade contour of WABU-TV. Our engineering review of the revised technical statement submitted by BUCI on July 5, 1994, confirms the absence of such overlap.[8] Regarding CTV's allegation, it has not shown how Grade A and Grade B overlap between parent and satellite stations violates the "spirit" of the Commission's satellite policy. Further, the Commission determined in *Television Satellite Stations, supra,* that overlapping Grade A and Grade B contours between parent and satellite stations are acceptable, as long as the City Grade contours of the stations do not intersect. This approach facilitates satellite service to areas with a demonstrated need for such service, yet protects our diversity and competition goals in the core market areas of the stations' principal community contours. While some duplication of service may occur, spectrum efficiency concerns are addressed by precluding City Grade overlap and by the other elements of the presumption. *Id.* at 4214.

10. Next, both Paugus and CTV claim that allowing WNHT-TV to become a satellite of WABU-TV will jeopardize the viability of their and other New Hampshire stations by making syndicated programming more expensive and less available. According to the Objectors, their stations are more than 35 miles from Boston and they now are able to purchase syndicated programming, upon which they rely heavily, at a reasonable cost without bidding against Boston stations. The Objectors believe that, if WNHT-TV becomes a satellite of a Boston station, syndicators will: (a) require the New Hampshire stations to bid against Boston stations to acquire programming; and (b) look more favorably upon WNHT-TV because it will cover Boston and New Hampshire. In support of these contentions, CTV claims to have been told by program suppliers that their programs would not be available to local stations if WNHT-TV became a satellite of WABU-TV. In reply, the applicants contend that such claims have no factual basis and are supported only by hearsay.

11. With regard to the Objectors' assertion that the proposed satellite will make syndicated programming more expensive and less available to other New Hampshire stations, we agree with the applicants' argument that these claims are speculative. The Objectors' contentions are entirely unsupported and thus fail to meet the pleading standards of Section 309(d) of the Communications Act for either a petition to deny or an informal objection.

12. Finally, both Paugus and CTV allege that the people of New Hampshire will not receive the public service they deserve if WNHT-TV becomes a satellite of a Boston station. Station WNHT-TV is one of four commercial television stations allocated to New Hampshire, and the only local station in Concord, the state capital. According to Paugus and CTV, the proposed assignment would be the same as allocating another station to Massachusetts at the expense of the citizens of New Hampshire. CTV asserts that not only would the assignment deprive New Hampshire of one of its four television allocations, but it would also deprive the citizens of any local programming. Further, CTV states, the applicants provide only two sentences to explain how they plan to address the unmet programming needs of the Concord area.

13. Again, the applicants argue that the assertions made by Paugus and CTV are speculative with no factual support. As pointed out by the applicants, the people of New Hampshire will not be deprived of any service since station WNHT-TV has been off the air for five years. Because several attempts to operate WNHT-TV as a full-service

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[6] In *Cape Television Inc.*, 9 FCC Rcd 6389 (1994), the Commission granted BUCI's application to operate WCVX-TV as a satellite of WQTV-TV, Boston, Massachusetts. We note that on November 4, 1995, the call sign of WQTV-TV was changed to WABU-TV.

[7] We reject Paugus' allegation that the initial technical proposal by BUCI showed incorrect or misleading City Grade overlap. Paugus' claim is based on a WNHT promotional contour map overlaid with TV Fact Book data. The map is neither identified as to its preparer, supported by an affidavit, nor signed by a technical consultant. Further, an examination of this promotional contour map shows that it is incorrect on its face and that Grade A overlap, rather than City Grade overlap between the applicants' stations, has been depicted.

[8] The revised technical statement was incorporated into an application for modification of WNHT-TV's authorized facilities, which was filed by BUCI on February 14, 1995. The applicant proposes to decrease the station's antenna radiation center height above average terrain (HAAT) to 320 meters and to maintain the effective radiated power of 1860 kilowatts.

station have failed, the applicants contend that just putting the station on the air will benefit the people of New Hampshire. Moreover, the applicants argue that BUCI's parent, Boston University, has a history of service to the Greater Boston Area, which includes Concord, New Hampshire as part of the Arbitron-determined Boston Area of Dominant Influence. Finally, the applicants point to a proposal submitted by Paugus to WABU-TV which proposed combining WABU-TV and WGOT-TV with two TV translators to create a signal that would run from Cape Cod to the Canadian border, and that would cover Boston, Providence, Manchester, all of New Hampshire and parts of Vermont and Maine. If Paugus believed its proposal would serve the people of New Hampshire, then, according to the applicants, it should have no problem with their currently proposed satellite operation.

14. We are not persuaded, as the Objectors have alleged, that the proposed satellite authorization will prevent the people of New Hampshire from receiving public service programming. First, the proposed satellite operation will return to the air a station that has been dark for over five years. It is difficult to imagine how maintaining this status quo would serve the local programming needs of audiences in Concord. Second, through its programming statement BUCI has pledged to "familiarize itself with the unmet programming needs of the Concord, New Hampshire area, as well as local problems, needs and interests, and will air programming responsive thereto." Moreover, BUCI has also stated it will make the facilities available for the discussion of issues of importance to all its viewers. Thus, it appears that BUCI is cognizant of and intends to comply with the Commission's programming policies. *See Programming Information in Broadcast Applications.* 3 FCC Rcd 5467 (1988), *aff'd sub nom., Office of Communications of the United Church of Christ v. FCC*, 911 F2d 803 (D.C. Cir. 1990). In sum, we are not persuaded that the proposed operation of WNHT-TV as a satellite of WABU-TV would disserve the public interest.

CONCLUSION

15. Based on the information before us, we find that the applicant is entitled to the presumption that the proposed satellite operation is in the public interest. We are not persuaded, as suggested by Paugus or CTV, to conclude that the presumption not be followed in this case. The Objectors have failed to present a substantial and material question of fact that grant of the instant application would be inconsistent with the public interest. In view of the foregoing, and having determined that the applicants are qualified in all other respects, we find that a grant of the application would serve the public interest.

16. Accordingly, IT IS ORDERED, That the informal objections filed by Paugus Television, Inc. and by CTV of Derry, Inc., ARE DENIED.

17. IT IS FURTHER ORDERED that the request of Boston University Communications, Inc. for operation of station WNHT-TV, Concord, New Hampshire, pursuant to the satellite exception to the duopoly rule, Note 5 to Section 73.3555(b) of the Commission's Rules, IS GRANTED.

18. IT IS FURTHER ORDERED, That the application to assign the license of television station WNHT-TV, Channel 21, Concord, New Hampshire, from New England Television, Inc. to Boston University Communications, Inc., IS GRANTED, subject to the following conditions: That the assignment of license covered by BALCT-940107KG be consummated within sixty (60) days of the date of the grant; that the Commission be notified of such action within ten (10) days after consummation of the grant of this application; and that ten (10) days prior to commencement of regular programming operation, the assignee submit certification that equipment performance measurements were made in accordance with Section 73.1590 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

OPERATOR COMMUNICATIONS, INC.
dba ONCOR COMMUNICATIONS, INC.

File No. ENF-95-02

Investigation of Rates and Charges
for Interstate Operator Services

ORDER

Adopted: June 26, 1995; Released: July 3, 1995

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. On May 30, 1995, Operator Communications, Inc., an operator service provider (OSP), dba Oncor Communications, Inc., (Oncor) filed a motion[1] for an extension of the time within which to file the full cost and other information required by the Bureau's *Memorandum Opinion and Order and Order to Show Cause* in the above-captioned proceeding.[2] Oncor has requested a three month extension, from June 26, 1995, until September 29, 1995. In support thereof, Oncor states, *inter alia*, that it will need to retain expert witnesses to demonstrate its cost of capital, cost of aggregator locations, and potential harm to it should rates no higher than 115 percent of AT&T's OSP rates be prescribed for it.

2. It is the policy of the Commission that extensions of time shall not be routinely granted. *See* Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a). We do not find good cause to extend, for three months, the time within which Oncor must submit cost justification for its rates and charges. We are persuaded, however, that some additional time is warranted. We believe that an extension of seven weeks will afford Oncor a full opportunity to retain expert witnesses and to prepare written testimony and exhibits in the direct case format directed in the *Show Cause Order*.

3. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i) and 4(j) of the Communications Act of 1934, as amended, §§ 151, 154(i),(j), and authority delegated under 47 C.F.R. § 0.291, that Oncor's request for extension filed May 30, 1995, is GRANTED IN PART and otherwise IS DENIED.

4. IT IS FURTHER ORDERED that Oncor SHALL submit full cost justification for its interstate OSP rates and surcharges no later than August 18, 1995.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Acting Chief, Enforcement Division
Common Carrier Bureau

[1] Motion for Clarification, Establishment of a Procedural Schedule and Appointment of an Administrative Law Judge, filed May 30, 1995.
[2] Memorandum Opinion and Order and Order to Show Cause, DA 95-942 (released April 27, 1995) (*Show Cause Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Arkansas, Inc. CUID No. AR0016 (Fort Smith)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1995; Released: July 3, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Auburn, Inc. CUID No. WA0544 (Federal Way)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 26, 1995; Released: July 3, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Florida, Inc. — CUID No. FL0469 (Environs)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 26, 1995; Released: July 3, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of West Virginia, Inc. — CUID No. WV0114 (Parkersburg)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 26, 1995; **Released: July 3, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Arkansas, Inc. CUID No. AR0009 (Walnut Ridge)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 26, 1995; Released: July 3, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UNITED ARTISTS CABLE
OF BALTIMORE

Appeal of Local
Rate Order of City of
Baltimore, MD

ORDER

Adopted: April 4, 1995; Released: April 6, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On July 29, 1994, United Artists Cable of Baltimore ("UACB"), the franchisee in the above matter, filed an appeal of a local cable rate order adopted on June 29, 1994 by its franchising authority, the City of Baltimore, Maryland ("the City"). The City submitted an opposition to the appeal on August 15, 1994.[1] The rate order establishes a new regulated rate schedule for UACB's basic service tier rates and associated equipment.[2] Specifically, the City's rate order requires UACB to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. UACB raises three issues on appeal.[3] First, UACB challenges the provisions in the City's rate order regarding franchise fees as improper and violative of the Commission's rules. In reply, the City asserts that UACB has been underpaying its franchise fee obligations to the City. Second, UACB challenges the City's rate order setting rates for UACB's A/B switches and VCR connections. The City replies that because subscribers use both A/B switches and VCR connections to receive basic service, they are subject to local regulation. Third, UACB argues that the rate order improperly restricts its choice over how to pay refunds to subscribers. The City counters that there is nothing in the rate order restricting UACB's choice between the two refund methodologies allowed by the Commission's rules. The City further asserts that the rate order simply requires UACB to submit its refund plan to the City so that the City can be certain that UACB's plan is consistent with its rate order and the Commission's rules.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[4] In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[5] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering the local rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.[7]

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.[8] Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

A. Franchise Fee Itemization

5. UACB argues that the City's rate order erroneously concludes that "the Company is unlawfully itemizing franchise fees on subscriber bills in violation of FCC Rules."[9] UACB notes that while the City's rate order does not explain UACB's mistake, the City, prior to its rate decision, did provide UACB with examples of what it termed "proper" and "improper" franchise fee itemization.[10] The City's "proper" example shows a lower total rate than the

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[1] UACB did not file a reply in this proceeding.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] UACB also argues that the City has improperly set its rates for remote controls and converter boxes at their actual levels, which are lower than their maximum permitted levels, resulting in undercharges. However, the City subsequently permitted UACB to raise the rates at issue to their maximum permitted level (*see* Appeal at 5 n.2) and allowed UACB to offset the undercharges, rendering this issue moot.

[4] *See* 47 C.F.R. § 76.944.

[5] *See* Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) (*"Report and Order"*); Third Order on Reconsideration in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) (*"Third Recon. Order"*).

[6] *Third Recon. Order*, 9 FCC Rcd at 4346.

[7] *Id.*

[8] To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994) (*"Second Recon. Order"*), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

[9] Appeal at 1-2 (quoting City's Rate Order at 3).

[10] *See* Appeal, Exhibit 4 (Prior to its rate decision, the City provided UACB of sample subscriber bills of "proper" itemization and "improper itemization.").

accompanying "improper" example because the total amount in the "proper" example includes the franchise fee, while the "improper" example does not include the franchise fee in the total amount. UACB argues that the City's "proper" itemization example erroneously suggests that the cable operator should absorb franchise fee costs and that franchise fees can be identified only in a footnote to the total bill, and not as a separate line item on the bill itself.[11]

6. Under the Section 622(c) of the Cable Act, cable operators may identify as a separate line item of each regular subscriber bill the amount of the total bill assessed as a franchise fee, as well as the identity of the franchising authority to which the fee is paid.[12] Operators are not restricted to utilizing a footnote to the total bill as a means of identifying franchise fees. Commission staff addressed the question of franchise fee itemization on consumer bills in the April 26, 1994 *Public Notice*, in which we stated the following:

> The 1992 Cable Act allows cable operators to identify as a separate line item on their bills the amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid. The Commission has determined that the separate billing of such fees would burden consumers unnecessarily by requiring them to remit separate payments. Even listing such charges "below the line" would tend to confuse customers as to what is part of their bill. Thus, any bill may require only one payment for the operator's services, the total for which must include franchise fees itemized. The Commission otherwise has declined to dictate how a cable operator, choosing to itemize, may format its bill.[13] Local franchising authorities may adopt regulations consistent with the Commission's regulations on this matter.[14]

Any regulations adopted by a local franchising authority regarding bill itemization must be consistent with the Commission's regulations.[15] If franchising authorities choose to adopt regulations on this matter, we underscore that it would frustrate the intent of the statute if a franchising authority imposed burdensome additional itemization on an operator choosing to avail himself of the rights bestowed by [Section 622(c)], or otherwise attempted to nullify the effect of a Section 622(c) itemization through local regulations.[16] Therefore, a local franchising authority cannot dictate how a cable operator, choosing to itemize, formats such itemization. We find that UACB's method of itemizing franchise fees in subscriber bills is not inconsistent with the Commission's regulations and that it should be allowed to employ this method. Accordingly, we remand this issue to the City so that it can reform its order and make it consistent with these findings.

B. Franchise Fee Calculation

7. Franchise fees are taxes imposed by local franchising authorities on the earnings of cable operators.[17] At its discretion, however, an operator may add any franchise fees to the monthly rate billed to subscribers.[18] Payment of franchise fees provides cable operators the right to provide cable service to subscribers in a given community.[19] The amount of franchise fees imposed by a local franchising authority on a cable operator is generally set by the franchising authority and the fees are generally used by the franchising authority for the regulation of the basic service tier and associated equipment.[20] The franchise fee specificed in the franchise agreement between the City and UACB is five percent of UACB's "gross revenues."[21] The City argues that UACB's method of itemization has resulted in the City receiving less than five percent of the amount that UACB collects from subscribers. The City contends that "the franchise fee must equal 5 percent of the total amount that a subscriber pays; it is not a 5 percent charge on top of what the subscriber would otherwise pay."[22] In its Opposition, the City proposes several methods that UACB can use in calculating franchise fees. In its proposed method of calculating franchise fees, it is the City's understanding that an operator's "gross revenues" include the franchise fee it collects on behalf of the franchising authority. In essence, the City asserts that it should be able to assess from UACB as part of the franchise fee a percentage of the franchise fees. We disagree.

8. To clarify the proper method of calculating franchise fees, we must first define a cable operator's "gross revenues" under the Communications Act. We note that the Act does not state that any franchise fee collected by a cable system is to be included in totalling its gross revenues. The Act does, however, impose a limit on how much cable operators may be charged in franchise fees. Franchise authorities are permitted to assess a fee on an operator's gross revenues, but "[f]or any twelve-month period, the franchise fees paid by the cable operator with respect to any cable system shall not exceed 5 percent of

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[11] A franchise fee is a fee paid by the cable system to the local franchising authority for the right to provide cable service to subscribers in a given community. *See* Communications Act, § 622, 47 U.S.C. § 542.

[12] *See* Communications Act, § 622(c), 47 U.S.C. § 542(c); 47 C.F.R. § 76.985(a). The purpose of 622(c) is to provide cable operators the discretion to inform its subscribers that a portion of their bill is related to governmentally imposed costs. *See Report and Order*, 8 FCC Rcd at 5967.

[13] *Report and Order*, 8 FCC Rcd at 5973 ("Beyond the guidelines given [in the *Report and Order*] we are refraining from dictating how a cable operator choosing to itemize may format its bill and implement Section 622(c).").

[14] *Public Notice, Questions and Answers on Cable Rate Regulation*, Question No. 13 (released April 26, 1994).

[15] *See* 47 C.F.R. § 76.985(c) ("Local franchising authorities may adopt regulations consistent with this section."). *See also Report and Order*, 8 FCC Rcd at 5973.

[16] *Report and Order*, 8 FCC Rcd at 5973.

[17] *See* Communications Act, § 622, 47 U.S.C. § 622.

[18] *Id.; see also Report and Order*, 8 FCC Rcd at 5790.

[19] *See* Communications Act, § 622, 47 U.S.C. § 622.

[20] *Id.*

[21] Opposition, Exhibit D.

[22] Opposition at 6. For example, if the total bill for cable services is $32.00, exclusive of franchise fees, under the City's method of calculation, UACB's total subscriber bill would be $33.68. Of that amount, UACB would keep $32.00, and a franchise fee of $1.68 -- which is five percent of the total bill -- would be remitted to the City. In essence, this results in a franchise fee on the franchise fee. By contrast, under UACB's method, the City would receive only $1.60 (or five percent of $32.00) and the total subscriber bill would be $33.60. *See id.* at 9-11.

such cable operator's gross revenues derived in such period from the operation of the cable system."[23] Consequently, if we allowed the franchise fee itself to be subject to a franchise fee, as the City urges, and if the franchise agreement required a five percent assessment -- the maximum under the law -- a cable operator could end up paying more than the maximum franchise fee permitted under the Act.[24] Furthermore, under the Act, a cable operator's gross revenues are revenues derived "from the operation of the cable system."[25] Franchise fees, on the other hand, are not revenues derived "from the operation of the cable system,"[26] but rather are a charge levied by the franchising authority and, therefore, should not be included in totalling an operator's gross revenues. Therefore, we find that an operator's "gross revenues" do not include thep franchise fees it collects from subscribers. We are remanding this franchise fee calculation issue to the City so that it can enter a ruling consistent with these findings.

C. A/B Switches and VCR Installations

9. UACB argues that the City, in its rate order, incorrectly determined that A/B switches should be regulated. We have previously held that switches are not devices directly related to the delivery of basic cable service and therefore their price should remain unregulated.[27] Regulated equipment consists of equipment in the subscriber's home that is used to receive regulated cable service.[28] A/B switches are used by subscribers to switch off cable services and to receive, instead, over-the-air broadcast signals. Since the switches are not "equipment used by subscribers to receive the basic service tier" within the meaning of Section 3(b)(3) of the 1992 Cable Act,[29] their price is not subject to regulation.

10. We disagree with UACB that the regulatory treatment accorded to A/B switches should be accorded to VCR installations as well. We have previously held that, since VCRs are used "to receive the basic service tier," they are subject to our rate regulations.[30] UACB had established two different charges to install a subscriber's VCR by connecting the VCR to the subscriber's cable service. One charge applied to the operator's installation of the VCR during the subscriber's initial installation of cable service. A second, and higher, charge applied to the operator's installation of the subscriber's VCR if a separate trip by the cable technician were required. The 1992 Cable Act directed us to establish rate standards for "installation and lease of equipment used to receive the basic service tier."[31] Our rules provide that regulated equipment consists of all equipment in a subscriber's home used to receive basic service.[32] Rates for installation of such equipment must be based on actual costs and must be "unbundled" or priced separately.[33] When basic service is installed through a subscriber's VCR, the VCR is used "to receive the basic service tier."[34] Since VCRs are, indeed, used "to receive the basic service tier," UACB's charges for VCR installations are subject to our rate regulations. Those charges must comport with the actual cost standard of our rules.

D. Refund Plans

11. The Commission's rules permit a cable operator, at its discretion, to implement a refund under one of two methodologies: (1) by returning overcharges to those subscribers who actually paid the overcharges, or (2) by giving a prospective percentage reduction on future bills to those subscribers who actually paid the overcharges.[35] In this case, UACB has chosen the second method of giving refunds. UACB contends, however, that the City, by requiring UACB to submit its refund methodology for approval, is in effect restricting an operator's discretion to select which refund methodology it wants to use. The City counters that there is nothing in the rate order that restricts UACB's selection of a refund method from the two refund methodologies allowed by the Commission's rules. According to the City, the rate order simply requires UACB to submit its refund plan to the City so the City may assess its consistency with the Commission's rules.

12. One way in which a franchising authority may be assured that an operator is in compliance with a refund order is by reviewing and, thereafter, approving the cable operator's proposed refund plan. We agree with the City that the conditions imposed on UACB by the challenged provision in the rate order -- *i.e.*, that UACB identify the basis for calculating its refunds, that UACB identify the applicable interest rate and how it was calculated, and that UACB explain how rate refunds will be implemented -- do not restrict UACB's ability to select a particular rate refund methodology under the Commission's rules.[36] Therefore, the City can require UACB to submit its refund plan to the City to ensure that it complies with the City's rate order and that it is consistent with the Commission's rules.

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[23] *See* Communications Act, § 622(b), 47 U.S.C. § 542(b).

[24] For example, if the total charge for cable services alone, exclusive of any franchise fee, is $32.00, a five percent franchise fee of that amount is $1.60. Under the City's method of calculation (*see* note 22, *supra*), cable operators have to pay 5.26% of $32.00 in order for the City to collect $1.68 for a franchise fee. A 5.26% franchise fee assessment exceeds the maximum allowed under the Act.

[25] *See* Communications Act, § 622(b), 47 U.S.C. § 542(b).

[26] *See* 47 C.F.R. § 76.5 (Cable system is defined as "[a] facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . .").

[27] *See* TCI of Northern New Jersey, DA 95-25, at ¶ 9 (Cab. Serv. Bur., released January 10, 1995); SBC Media Ventures (Montgomery County, MD), DA 94-1251, 9 FCC Rcd 7175, 7180 (Cab. Serv. Bur. 1994).

[28] *See* 47 C.F.R. § 76.923(a).

[29] *See* Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3).

[30] *See* TCI of Northern New Jersey at ¶ 10.

[31] *See* Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3). *See also* 47 C.F.R. § 76.923(a).

[32] 47 C.F.R. § 76.923(a).

[33] 47 C.F.R. § 76.923(b). *See also Report and Order*, 8 FCC Rcd at 5810 ("[W]e will require separate charges for each significantly different type of . . . installation.").

[34] *Report and Order*, 8 FCC Rcd at 5810.

[35] *See* 47 C.F.R. § 76.942(d).

[36] *See* Appeal, Exhibit 1 (City's Rate Order at 7).

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that United Artists Cable of Baltimore's appeal of the City of Baltimore's local rate order, regarding the issue of UACB's permitted charges for converter boxes and remote controls is DISMISSED as moot.

14. IT IS FURTHER ORDERED that United Artists Cable of Baltimore's appeal of the City of Baltimore's local rate order, regarding the issue of franchise fee itemization and the issue of franchise fee calculation are REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

15. IT IS FURTHER ORDERED that United Artists Cable of Baltimore's appeal of the City of Baltimore's local rate order, regarding the regulatory status of UACB's A/B switches is REMANDED to the local franchising authority for resolution in accordance with the terms of this Order.

16. IT IS FURTHER ORDERED that United Artists Cable of Baltimore's appeal of the City of Baltimore's local rate order, regarding the regulatory status of UACB's VCR installations is DENIED.

17. IT IS FURTHER ORDERED that United Artists Cable of Baltimore's appeal of the City of Baltimore's local rate order, regarding the issue of refund plans is DENIED.

18. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Scott Cable Communications, Inc. Marksville, Louisiana	LA0439 (City of Avoylles Parish)

Benchmark Filing to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 1995; Released: April 19, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price Scott Cable Communications, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS pricesupon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Scott has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*Second Order on Reconsideration)*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Scott implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See* Second Order on Reconsideration, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also* Second Order on Reconsideration, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Northern New Jersey, Inc.	CUID Nos. NJ0034 (Borough of Oakland), NJ0036 (Township of Wayne), NJ0183 (Township of Little Falls), NJ0313 (Borough of Ramsey) and NJ0331 (Borough of Hasbrouck)

Benchmark Filing to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 1995; Released: April 20, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price TCI of Northern New Jersey, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Service Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bresnan Communications Company	CUID No. MI0131, Calumet Village, MI

Benchmark Filing to Justify Cable Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 1995; Released: April 19, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price Bresnan Communications Company ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cox Cable Cleveland, Inc. CUID Nos.
OH0247 (Lakewood)
OH0271 (Parma)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 1995; Released: April 19, 1995

By the Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaints filed against Operator, while asserting that they challenge CPS rates, challenge only rates for basic service and equipment, not CPS. The complaints therefore do not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B). that the complaints filed prior to May 15, 1994, against the cable programming service prices charged by Operator in the communities referenced in the caption ARE DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cox Cable Rhode Island, Inc. CUID Nos.
RI0013 (Cranston)
RI0014 (Johnston)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 1995; Released: April 19, 1995

By the Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaints filed against Operator, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. The complaints therefore do not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed prior to May 15, 1994, against the cable programming service prices charged by Operator in the communities referenced in the caption ARE DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jones Intercable, Inc. CA0772 (City of Yorba Linda)
CA0163 (City of Roseville)

Benchmark Filing to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 1995; Released: April 19, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the price Jones Intercable, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS pricesupon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Jones has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*Second Order on Reconsideration)*, the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Jones implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See* Second Order on Reconsideration, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also* Second Order on Reconsideration, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Tel-Com, Inc. CUID No. KY0159 (McDowell)
McDowell, Kentucky

Benchmark Filing to Justify Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 1995; Released: April 20, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Tel-Com, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division,
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Union CATV, Inc. CUID No. KY0560 (Morganfield)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 1995; Released: April 20, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price Union CATV, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in Morganfield, Kentucky, CUID No. KY0560, on the ground that the complaint concerns rates that are outside the jurisdiction and authority of this Commission. As explained below, the Commission regulates rates for CPS only, and then only upon filing of a valid complaint. Our review reveals that the complaint filed against Operator, while asserting that it challenges CPS rates, challenges only rates for basic service, not for CPS. The complaint therefore does not trigger the Commission's jurisdiction, and is accordingly dismissed.

2. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")[1] distinguishes among basic cable service, premium cable service, and cable programming service.[2] The basic service tier is the minimum package of cable service that a consumer can buy. Except in limited circumstances, the Commission does not have jurisdiction over rates for the basic service tier, and cannot act upon complaints concerning rates for that tier. Premium cable service consists of channels that are paid for individually (per-channel) or per-program. Bystatute, these channels are not subject to rate regulation.[3] CPS includes all video programming that is not on the basic service tier which the operator offers as a package of channels. Rates for CPS tiers are subject to regulation by the Commission in response to a valid complaint.

3. In this case, Operator has informed the Commission that as of September 1, 1993, it only offered one tier of service in the community referenced above. The channel line-up and rate card that Operator submitted support this assertion.

4. The complaint under consideration here was filed with the Commission on FCC Form 329. FCC Form 329 is used by subscribers or local franchising authorities wishing to lodge with the Commission a complaint about an operator's CPS rates. The form is entitled "Cable Programming Service Rate Complaint." While the form is designed for use in challenging CPS tier rates, the definition of CPS tier rates is not made clear on the face of the form and it is possible that someone might complete the form without understanding the difference between basic tier rates, premium service rates, and CPS tier rates.[4]

5. We have examined the complaint and Operator's response, and we conclude that the complaint challenges only basic rates, not CPS rates. Although the complainant indicates that the rates challenged violate the Commission's rules, the specific information provided by the complainant indicates that only basic rates are at issue. When only basic rates are being challenged, the complaint should properly be brought to the attention of the local franchising authority in the first instance, and not filed with this Commission. If any complaint does in fact challenge CPS rates, the complainant may file a petition for reconsideration providing information adequate to support his or her challenge.

6. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2)(A) and (B), that the complaint filed prior to May 14, 1994, against the cable programming service price charged by Operator in Morganfield, Kentucky, CUID No. KY0560, IS DISMISSED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division,
Cable Services Bureau

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (Cable Act of 1992).
[2] Cable Act of 1992, Section 602, 47 U.S.C. § 522.
[3] Cable Act of 1992, Section 623(a)(1), 47 U.S.C. § 543(a)(1).
[4] We note that operators have great latitude in determining what channels will be included in the basic tier; once the statutory minimum (broadcast and public educational and governmental access channels) is met, the operator may include as many additional channels in the basic tier as it wants, or it may move additional channels to a higher tier. Thus it is possible that a complainant might not clearly understand which channels are part of which tier.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

KBLCOM, Inc. CUID Nos.
CA0943 (Garden Grove)
CA0944 (Los Alamitos)

Benchmark Filing to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 1995; Released: April 20, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price KBLCOM, Inc. d/b/a Paragon Cable ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Service Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Greater Michigan, Inc. — CUID Nos. MI0042 (South Haven), MI0274 (Niles), MI0275 (Niles Township), MI0310 (Howard), MI0368 (Buchanan), MI0369 (Buchanan Township), MI0421 (Saugatuck), MI0490 (Fennville), MI0491 (Douglas), MI0492 (Saugatuck), MI0660 (Lincoln), MI0661 (St. Joseph), MI0924 (Independence), MI0988 (Orion) and MI1477 (Milton)

TCI Cablevision of Oakland County, Inc. — CUID Nos. MI0050 (Gaylord), MI0268 (Bagley), MI0337 (Meridian), MI0826 (Rochester Hills), MI0827 (Berkley), MI0828 (Clawson), MI0833 (Auburn Hills), MI0834 (Rochester), MI0835 (Royal Oak) and MI0836 (Troy)

TCI Cablevision of Woodhaven, Inc. — CUID Nos. MI0432 (Lincoln Park), MI0447 (Gibralter), MI0448 (Woodhaven), MI0638 (Trenton), and MI0639 (Riverview)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 1995; Released: April 18, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (each and "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above. Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The first valid CPS complaints in each of the franchise areas which are the subject of this Order were completed and served on the respective Operators and received by the Commission on the dates set forth on Appendix A. Operators filed FCC Form 393s in response; Operators have also filed amended and supplemental Form 393 filings, most recently on May 27, 1994.[11]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent an Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in prices for the period after May 14, 1994 may be required to reflect the fact that the prices during the earlier period, which are used as the starting point to calculate the prices for the prospective period, were unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operator filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common

5. On June 17, 1994, the local franchising authorities ("LFAs") for the City of Gaylord, Michigan (CUID No. MI0050) and the Township of Bagley, Michigan (CUID No. MI0268) filed identical motions captioned as a "Request For Default and To Supplement the Record" against TCI Cablevision of Oakland County, Inc. ("Oakland Operator"). On June 29, 1994, Oakland Operator responded to the motions by filing motions captioned as "Motion To Strike and Opposition To Request for Default and To Supplement the Record."

6. The LFAs request that we find Oakland Operator in default for its failure to file and serve timely and proper responses to their rate complaints. The LFAs state that Oakland Operator filed its rate justifications late, in an incomplete fashion and not on the proper form. They also state that in February 1994, Oakland Operator began charging a home wire maintenance fee which is not reflected in its rate justification filings. Oakland Operator responds by stating that the Commission's Rules do not contemplate the filing of motions and Oakland Operator requests that the Commission disregard the LFAs' motions.

7. In response, we note that on May 27, 1994, Oakland Operator did file its rate justifications on the proper form within the "window of opportunity" established in our May 23, 1994 Order.[12] We also note that while Oakland Operator may have filed its rate justifications in an untimely fashion, Oakland Operator does not claim an Inflation Adjustment Factor for any franchise area that exceeds what it could have claimed if it had timely filed. The wire maintenance fee issue is addressed below. Accordingly, we grant in part and deny in part the LFAs' and Oakland Operator's motions.

8. For some of the communities at issue in this Order, Operators' actual CPS tier prices were above the maximum permitted prices that they calculated for the CPS tier and, thus, such Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable. For other communities, Operators' prices were at or below their calculated maximum permitted prices. Upon review of Operators' submissions we have found that in all cases they have not correctly calculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators calculations in their Form 393s:

a. The 1992 Cable Act requires operators to fully unbundle equipment and installation costs from programming costs.[13] The Commission's regulations implement Congress's directive by requiring operators to establish an equipment basket.[14] Section 76.923(c) of the Commission's regulations specifically states that equipment basket costs shall include "the direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment." In its Order adopting rate regulations, the Commission amplified this regulation by stating that "[t]he basket will include an allocation of all those system joint and common costs that service installation, leasing, and equipment repair share with other system activities, excluding general system overhead."[15] When completed correctly Part III of FCC Form 393 unbundles equipment costs from programming costs.

b. Operators, however, have not properly completed Part III of their FCC Form 393s and thus have not completely unbundled equipment and installation costs from programming costs as directed by the 1992 Cable Act and the Commission's regulations. Specifically, on Schedule A of Part III Operators have not reported any maintenance facility cost for installations and service of customer leased equipment, and on Schedule B they have not reported any costs for utilities. The lack of maintenance facility and utility costs might be correct if Operators' Schedule B allocations reflected that contract or third-party labor was performing all equipment installations and repairs. The allocations that Operators make in their Schedule B Analysis, however, indicate that their own employees performed customer equipment installation and maintenance.

c. Not only are Operators' Schedule B allocations inconsistent with not having any maintenance facility costs, their allocations are also inconsistent with the argument that the repair of converters and remotes was performed off premises by a third party. Operators have included on Schedule B and their Schedule B Analysis entries for contract labor and "Converter Maintenance." These entries, however, further indicate that Operators have not fully unbundled their equipment costs from their regulated service costs. In their Part III, Step C, Line 9 explanations, Operators set forth the number of hours that they devoted to maintenance and service of remotes and converters.[16] If Operators' contract labor and converter maintenance entries are added together and the sum is divided by the number of reported hours for converter and remote maintenance, the resulting cost per hour in these communities ranges from $5.00 to $16.50. Moreover, this calculation overstates Operators' reported labor costs because it ignores that some portion of the converter maintenance cost must be for supplies. We have recognized that it is not unreasonable to assume that operators should incur a contract labor charge of $25.00 per hour for the service and maintenance of remotes and convertors.[17] Not only are Operators' reported labor costs for the service and maintenance

deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] *Id.*

[13] 47 U.S.C. § 543(b)(3).

[14] 47 C.F.R. § 76.923(b).

[15] Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 at 5815, ¶ 295 (1993) (footnote omitted). *See also* First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164 at 1190, ¶ 47 (1993).

[16] *See also* Operators' FCC Form 393s at Part III, Line 9 and Line 16.

[17] *See* Harron Communications Corp. v. Commonwealth of Massachusetts Community Antenna Television Commission, CUID Nos. MA0225, MA0247, MA0229, MA0228, MA0245, MA0224, MA0246, DA 95-160, at ¶ ¶19 -20 (Cab. Serv. Bur., released Feb. 7, 1995).

of remotes and convertors substantially below this figure, they are also well below their own hourly service charge as calculated on Line 5, Step A, Part III of its Form 393s.[18] Thus, Operators' contract labor cost added to their Converter Maintenance cost cannot represent all of Operators' converter maintenance costs, and there must remain costs related to installations and service of customer leased equipment that Operators have not included on Form 393, Part III.[19]

d. Operators have not justified their Part III allocations. The Commission has repeatedly stated that where an operator does not provide adequate information to justify its rate, the Commission will set the maximum permitted rate based on the best evidence available to it.[20] Simply put, Operators cannot be permitted to delay subscriber refunds by failing to provide information that is needed to determine a maximum permitted rate. Since Operators have not justified their Part III allocations and have not calculated an acceptable figure for unbundling equipment and installation costs from programming costs, we must impute an estimated equipment cost figure. We have determined based on the best evidence available to us at this time that Operators Part II, Worksheet 3, Line 303 entry in each community should be $0.060 of installation and customer equipment costs per subscriber per channel. We have derived this figure by analyzing a sample of other operators' FCC Form 393 filings, including both filings as to which we have already issued orders and filings that are currently under review, and we have observed that generally operators have an average unbundling figure of $0.06 per subscriber per channel.[21] We have further determined that in order to yield an unbundling figure of $0.060 per subscriber per channel, Operators must have incurred more installation and customer equipment costs than they reported, and we have therefore revised their entries on Part II, Worksheet 1, Line 104 and Part II, Worksheet 3, Line 301.[22] While we recognize that this is not an ideal way to determine the correct amount of costs to unbundle and thus to derive a maximum permitted CPS rate, it is the only approach available to us where an operator does not supply sufficient information to justify its price.

e. Because Operators have failed to demonstrate that their prices for the CPS tier were not unreasonable, we will set maximum permitted prices for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheets 1 and 4, on the basis of the most accurate data currently available for the date for which an Operator filed.[23] On their amended Form 393s, Operators calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operators used in justifying their rates, of 1.030.

9. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the period in question. Operators showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.[24] However, we further determine that for CUID No. MI0050 the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund in this franchise area.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of theCommission's rules, 47 C.F.R. § 0.321, that the LFAs' and Oakland Operator's motions ARE GRANTED IN PART AND DENIED IN PART.

11. IT IS FURTHER ORDERED that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A herein, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

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[18] Operators' calculated hourly service charge in these communities ranges from $21.30 to $27.24.

[19] We also note that Operators have failed correctly to gross-up their taxes on Schedules A and C. If, as in other communities, Operators are charging a wire maintenance fee we would expect to see these costs reflected in Operators' rate justification filings. Both of these facts provide additional evidence that Operators have not fully unbundled their equipment costs from their programming costs, and our calculation of an imputed equipment cost figure is intended to correct for any distortion of Operators' permitted rates that may be caused by these errors.

[20] *See* Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-90, 9 FCC Rcd 4316 at 4348, ¶ 90 (1994); Cable Operators' Rate Justification Filings, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[21] *Cf.* United Video Cablevision, Inc ., CUID Nos. MA0333 and MA0334, DA 94-1144, at ¶10 (b) n.24 (Cab. Serv. Bur. released Nov. 9, 1994) (utilizing observed industry average depreciation lives where operator without explanation departed substantially from industry norms in cost-of-service justification).

[22] This adjustment to Worksheet 1 has the effect of causing Operators in some communities to calculate their permitted rate from Form 393, Part II, Worksheet 2 rather than Worksheet 1. For some of their franchise areas, however, Operators have not completed Worksheet 2 of Form 393. For these franchise areas, therefore, we have computed Worksheet 2 by using data supplied by Operators on their Form 1200 filing.

[23] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[24] This finding is based solely on the representations of Operators and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities shown in Appendix B, except for CUID No. MI0050, that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[25] to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

13. IT IS FURTHER ORDERED that each Operator shall promptly determine the overcharges to its CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

14. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that each Operator shall, within 30 days of the release of this Order, revise its Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).[26]

15. IT IS FURTHER ORDERED that each Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filings required above, prices that reflect the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
MI0042	10/20/93	10/18/93
MI0050	2/28/94	2/25/94
MI0268	10/26/93	10/22/93
MI0274	10/4/93	9/29/93
MI0275	10/26/93	10/20/93
MI0310	10/14/93	9/29/93
MI0337	11/1/93	10/28/93
MI0368	11/15/93	11/8/93
MI0369	10/4/93	9/29/93
MI0421	10/18/93	10/13/93
MI0432	10/12/93	10/7/93
MI0447	10/26/93	10/20/93
MI0448	10/4/93	9/29/93
MI0490	10/18/93	10/13/93
MI0491	2/28/94	2/25/94
MI0492	2/28/94	2/28/94
MI0638	1/26/94	1/20/94
MI0639	10/12/93	10/8/93
MI0660	10/2/93	10/4/93
MI0661	11/1/93	10/25/94
MI0826	10/21/93	10/18/93
MI0827	10/1/93	9/27/93
MI0828	11/3/93	9/28/93
MI0833	11/3/93	10/26/93
MI0834	11/8/93	10/31/93
MI0835	10/8/93	10/4/93
MI0836	9/27/93	9/23/93
MI0924	10/21/93	9/18/93
MI0988	10/26/93	10/21/93
MI1477	9/30/93	9/28/93

Appendix B

CUID No.	Actual Rates	Maximum Permitted Rates
MI0042	$12.24	$11.76
MI0050	$11.70	$11.51
MI0268	$11.70	$11.51
MI0274	$11.31	$10.26
MI0275	$11.31	$10.26
MI0310	$11.31	$10.26
MI0337	$10.20	$9.58
MI0368	$11.31	$10.26
MI0369	$11.31	$10.26
MI0421	$12.24	$11.64
MI0432	$11.21	$10.75
MI0447	$11.21	$10.75
MI0448	$11.21	$10.75
MI0490	$12.24	$11.64
MI0491	$12.24	$11.64
MI0492	$12.24	$11.64
MI0638	$11.21	$10.75
MI0639	$11.21	$10.75
MI0660	$11.33	$9.90
MI0661	$11.33	$9.90
MI0826	$13.03	$11.70
MI0827	$13.03	$11.70
MI0828	$13.03	$11.70
MI0833	$13.03	$11.70
MI0834	$13.03	$11.70
MI0835	$13.03	$11.70
MI0836	$13.03	$11.70
MI0924	$12.09	$11.52
MI0988	$12.09	$11.52
MI1477	$11.31	$10.26

[25] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

[26] We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Falcon Holding Group, Inc.	AL0060, AR0048, AR0231, AR0234, AR0376, CA0065, CA0073, CA0101, CA0152, CA0229, CA0249, CA0450,
Order Dismissing Compaints	CA0582, CA0622, CA0626, CA0680, CA0708, CA0778, CA0844, CA0850, CA0890, CA0903, CA0959, CA1048, CA1049, CA1118, CA1187, CA1189, CA1190, CA1209, CA1274, CA1401, GA0036, GA0317, KY0017, KY0062, KY0067, KY0078, KY0529, KY0636 MD0004, MI0696, MO0019, MO0020, MO0024, MO0057, MO0750, NC0105, NC0119, NC0151, NC0152, NC0428, NC0965, OR0015, OR0045, OR0058, OR0071, OR0081, OR0180, OR0181, OR0199, OR0342, OR0359, TX0669, VA0025, VA0182, WA0168, WA0229, WA0321

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 1995; Released: April 18, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider complaints about the prices Falcon Holding Group, Inc. ("Operator") charges for its cable programming service ("CPS") tiers in numerous communities designated by the Community Unit Identification ("CUID") numbers referenced above. The attached Appendix contains a list of the communities which are the subject of this Order ("subject communities"). Rather than attempting to justify its prices through a benchmark or cost of service showing, Operator responded to the complaints by stating that it has no CPS tier in those systems. On March 28, 1995, Operator submitted additional information in support of its claim that rate-regulated CPS tiers did not exist as of September 1, 1993, and still do not exist, in any of the subject communities.[1] In addition, Operator provided an affidavit, signed by the Corporate Officer in charge of Operations, in support of its claims that in the communities covered by this Order Operator offers a la carte packages of six channels or fewer and no other CPS tiers.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with validCPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

II. BACKGROUND

4. When Operator restructured its rates and tiers as of September 1, 1993 to conform to the Commission Regulations, it eliminated its CPS tiers in each of the subject communities and put those channels into either the basic tier or an a la carte package. We subsequently issued letters of inquiry ("LOIs") to Operator to determine whether similar restructuring in two communities - Port Orchard, Washington and Southern Shores, North Carolina - constituted an evasion of rate regulation. On December 22, 1994, we released two Orders resolving these LOIs.[12] We found that Operator's systems in both communities were

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[1] Operator also asserts that it was not served with complaints in some of the subject communities, and that in other communities the complaints address only its charges for the basic service tier. In light of our disposition of the complaints in this Order, we need not address those arguments.

[2] *See* letter dated April 5, 1995 from Matthew D. Emmer, Esq. of Fleischman and Walsh, L. L. P., Attorney-of-Record for Falcon Holding Group, Inc., to David O. Ward, Esq. of the FCC which included the attached Affidavit of Joe A. Johnson, Senior Vice President, Operations for Falcon Cable TV dated April 4, 1995.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended,* 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See* Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*Second Order on Reconsideration);* 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.n

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

[12] *See* Falcon Cable TV, Port Orchard, Washington, LOI-93-50, DA 94-1548 (Cab. Serv. Bur., released Dec. 22, 1994) (*Port Orchard Order)* and Falcon Cable TV, Southern Shores, North Carolina, LOI-94-2, DA 94-1551 (Cab. Serv. Bur., released Dec. 2, 1994) (*Southern Shores Order).*

similar in that each no longer had a traditional CPS tier after restructuring on September 1, 1993, but instead had a larger regulated basic tier and a new a la carte tier. We further found that in each case Operator automatically subscribed its previous CPS customers to its a la carte package, and in each case the evidence showed that very few subscribers viewed the option of accepting individual a la carte channels as a realistic service option. The most significant difference was that in the case of Port Orchard the new a la carte package had six channels, all of which were migrated from previously regulated tiers, but in the case of Southern Shores the new a la carte package had ten channels, nine of which were migrated from previously regulated tiers. In both cases, we found that Operator's restructuring may have had the effect of evading rate regulation. However, on applying the two-part test set forth in the *Rate Order*[13] and the 15 interpretive guidelines set forth in the *Second Reconsideration Order*,[14] we reached substantially different conclusions regarding whether the restructuring clearly evaded the Commission's Rules in effect at the time of the restructuring:

a. In the *Port Orchard Order*, we found that Operator's elimination of its CPS tiers and their replacement by a larger basic tier and an a la carte package of six channels was not a clear evasion of the Commission's Rules because most of the rate-regulated CPS tier channels were merely transferred to the rate-regulated basic tier, and only six of those previously regulated channels were treated as an unregulated collective offering of a la carte channels.[15] We held that given the small number of previously regulated CPS channels moved into the new a la carte package, Operator may treat the package as a non-regulated new product tier[16] that may be priced at market levels under the *Going Forward Order*.[17]

b. However, in the *Southern Shores Order*, we found that Operator had not sufficiently justified its elimination of the regulated CPS tiers because it used nine of those channels to create a purportedly non-regulated, 10-channel a la carte tier on the eve of regulation, and it automatically subscribed its customers to the offerings that previously had been part of its Tier 1 and Tier 2 CPS packages.[18] Consequently, we ordered Operator to treat the ten-channel a la carte tier as a rate-regulated CPS tier.[19]

5. Since the *Port Orchard Order* found that Operator's restructuring of its CPS tier into the basic tier and an a la carte tier of six channels did not constitute an evasion of rate regulation, and that those channels not placed on the basic service tier could be treated as a new product tier, there was no CPS tier in that community, as of September 1, 1993, that was subject to rate regulation pursuant to Section 76.922 of our rules. Therefore, the Bureau's action effectively dismissed all FCC Form 329 complaints filed against Operator in its Port Orchard franchise area for rates that were in effect on September 1, 1993.[20]

III. DISCUSSION

6. In each of the subject communities, Operator has demonstrated that it restructured its service offerings on September 1, 1993 in essentially the same way that it did in the Port Orchard community where an LOI order has been issued.[21] Specifically, Operator has shown that it discontinued its CPS offerings and placed all of its channels into a single basic service tier, except for a few channels which it offered on an a la carte basis. In the subject communities, Operator offered two to six a la carte channels in its unregulated a la carte package.

7. We feel that we have sufficient information regarding Operator's restructured offerings in the subject communities to conclude, in accordance with the *Going Forward Order*, that they should be treated the same way that we treated Operator's restructured offerings in the *Port Orchard Order*.[22] *As in the Port Orchard community, although the instant restructuring resulted in the elimination of Operator's CPS tiers, the small number of channels that were offered in the a la carte package did not constitute an evasion of our then existing rules. Therefore, consistent with the action taken in the Port Orchard Order*, we will allow Operator to treat its a la carte packages in the subject communities as new product tiers even though they would not qualify as new product tiers under the *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a CPS tier. Thus, we need not rule on the FCC Form 329 complaints filed against Operator in the subject communities because there were no CPS tiers subject to rate regulation pursuant to Section 76.922 of our rules as of September 1, 1993. In addition, nothing in these complaints indicate that Operator's new product tiers violate any of the conditions for establishing those tiers outlined in the *Going Forward Order*.[23]

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[13] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993), at ¶ ¶ 327-28.

[14] *Second Order on Reconsideration, supra*, at ¶ 196.

[15] *Port Orchard Order, supra*, at ¶ 20.

[16] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, MM Docket Nos. 92-266 and 93-215, FCC 94-286, ¶ 51 (adopted November 10, 1994).

[17] *Port Orchard Order* at ¶ 21.

[18] *Southern Shores Order, supra*, at ¶ 14 and 15.

[19] *Id.*, at ¶ 22.

[20] *See* Falcon Cable TV, Port Orchard, Washington, *supra*, at n.1.

[21] Letter dated March 28, 1995 from Falcon Holding Group, Inc.'s Attorney-of-Record, Matthew D. Emmer, Esq. of Fleischman and Walsh, L.L.P., to David O. Ward, Esq., of the FCC in response to a Staff *ex parte* request for additional information.

[22] This finding is based solely on the representations of Operator described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[23] We have excused one violation, *i.e.*, migrating channels from rate-regulated tiers, in only those situations where, as here, the new product tier is established as an outgrowth of our change in our a la carte policy. *See Going Forward Order* at Para. 51.

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that the a la carte packages created by Falcon Holding Group, Inc. in the communities listed in the attached Appendix may be treated as new product tiers under our *Going Forward Order*.

9. IT IS FURTHER ORDERED that all FCC Form 329 complaints pending against the CPS rates of Falcon Holding Group, Inc. each of the communities listed in the attached Appendix are DISMISSED.

10. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

APPENDIX

CUID	COMMUNITY	# A LA CARTE CHANNELS
AL0060	Scottsboro, AL	6
AR0048	Cherokee Village, AR	3
AR0231	Shannon Hills, AR	5
AR0234	Saline County, AR	5
AR0376	Maumelle, AR	5
CA0065	Big Bear Lake, CA	3
CA0073	Los Angeles County, CA	2
CA0101	Gilroy, CA	2
CA0152	San Bernardino County, CA	2
CA0229	San Bernardino County, CA	2
CA0249	Malibu, CA	4
CA0450	Pasadena, CA	5
CA0582	Soledad, CA	4
CA0622	Monterey County, CA	3
CA0626	Pasadena, CA	4
CA0680	Los Osos, CA	4
CA0708	Los Osos, CA	4
CA0778	Atascadero, CA	4
CA0844	Monterey County, CA	3
CA0850	Thousand Oaks, CA	5
CA0890	Monterey County, CA	3
CA0903	Pasadena, CA	5
CA0959	Salinas, CA	4
CA1048	Monterey County, CA	3
CA1049	Monterey County, CA	3
CA1118	Monterey County, CA	3

CUID	COMMUNITY	# A LA CARTE CHANNELS
CA1187	Agoura Hills, CA	4
CA1189	Salinas, CA	4
CA1190	Monterey County, CA	3
CA1209	Los Angeles, CA	4
CA1274	Running Springs, CA	3
CA1401	San Bernardino County, CA	2
GA0036	Habersham, GA	2
GA0317	Whitfield County, GA	6
KY0017	Burnside, KY	5
KY0062	Monticello, KY	5
KY0067	Mt. Vernon, KY	4
KY0078	Corbin, KY	4
KY0529	Calvert City, KY	3
KY0636	Bell County, KY	4
MD0004	Crisfield, MD	4
MI0696	Au Gres, MI	4
MO0019	West Plains, MO	6
MO0020	El Dorado, MO	3
MO0024	Warrensburg, MO	4
MO0057	Eldon, MO	4
MO0750	Sunrise Beach, MO	4
NC0105	Wilkes County, NC	3
NC0119	Kure Beach, NC	6
NC0151	Carolina Beach, NC	6
NC0152	New Hanover County, NC	6
NC0428	Pender County, NC	4

CUID	COMMUNITY	# A LA CARTE CHANNELS
NC0965	N. Topsail Beach, NC	4
OR0015	Warrenton, OR	6
OR0045	Gold Beach, OR	5
OR0058	Florence,OR	5
OR0071	Lincoln City, OR	6
OR0081	Dallas, OR	4
OR0180	Sutherlin, OR	6
OR0181	Brookings, OR	6
OR0199	Florence, OR	5
OR0342	Silverton,OR	5
OR0359	Lincoln City, OR	6
TX0669	Port Aransas, TX	4
VA0025	Chincoteague, VA	3
VA0182	Chincoteague, VA	3
WA0168	Port Orchard, WA	6
WA0229	Bremerton, WA	6
WA0321	Kitsap County, WA	6

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 17, 1995

Released: April 20, 1995

IN REPLY REFER TO:
DA 95-853

Steve Neu
Mountain Zone Television Supply
307 East Avenue E
Alpine, TX 79830

Dear Mr. Neu:

This letter is in reference to the letter you filed on April 11, 1995 with respect to a complaint filed November 26, 1993, against the price Presidio TV Cable ("Presidio") was charging for cable programming service in Presidio, Texas, CUID No. TX0296. In that letter, you state that Presidio's Presidio, Texas system has 640 subscribers. Based on the information you have provided, it appears that the Presidio system qualifies as a "small system" pursuant to 47 C.F.R. § 76.901(c), and was therefore exempt from rate regulation until May 15, 1994.

We will rule at a later date on Presidio's justification under the Commission's revised rate regulations of its cable programming service rates in Presidio beginning May 15, 1994. In that connection, we would need a channel line-up and rate card verifying your statement that Presidio provides only one tier of service.

Should you have any questions regarding this matter, please contact Peter G. Wolfe at (202) 739-0783.

Sincerely,

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

cc: City of Presidio

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of San Jose, Inc. — CUID No. CA0440 (Brisbane)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1995; Released: July 6, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation onbehalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable CUID No. FL0183 (Bradenton)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1995; Released: July 6, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. In particular, the record shows that complainant received only a basic tier of service, and not a CPS tier. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Scripps Howard Cable Company — CUID No. GA0053 (Homerville)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 27, 1995; Released: July 6, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area which is the subject of this Order was served on Operator and received by the Commission on February 25, 1994. Operator filed FCC Form 393 in response.

5. In its benchmark filing, Operator calculated a maximum permitted rate for the CPS tier of $13.79 per month (plus franchise fee). However, Operator's actual monthly charge for the CPS tier was $13.82 (plus franchise fee). Thus, Operator has failed to demonstrate that its price for the CPS tier was not unreasonable.

6. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Operator filed.[11] In its benchmark filing, Operator calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of November 1993 using data released by the U.S. Department of Commerce on August 31, 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.032 as the Inflation Adjustment Factor through November 1993, the base date Operator used in justifying its rates.

7. Upon review of the record herein, and having incorporated the adjustment discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $13.68 per month (plus franchise fee) for the period from February 25, 1994 to May 14, 1994.[12] However, we further determine that the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[12] This finding is based solely on the representations of Oper-

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $13.68 (plus franchise fee).[13]

10. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

ator and the modification described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[13] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB WORLDCOM SERVICES, INC. — File No. I-T-C-92-164

Application for blanket authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels communications between the U.S. and the countries of the former Soviet Union via the Statsionar 11 satellite for the provision of public switched network services

MEMORANDUM OPINION, ORDER, AND AUTHORIZATION

Adopted: June 23, 1995; **Released: July 5, 1995**

By the Chief, International Bureau:

1. Over the past two and one-half years, an increasing number of applications have been filed for authority to provide a full range of telecommunications services between the United States and the Russian Federation and other international locations using satellites owned, operated, or licensed by the Russian Federation.[1] Columbia Communications Corp., a U.S.-licensed separate international satellite system, opposes authorization of these applications until the Russian Federation grants "landing rights" to permit its satellite system in Russia.[2] Columbia claims that various anticompetitive actions by officials in the Russian Federation have denied its system "landing rights."

2. Given the seriousness of Columbia's allegations and our commitment to a fully competitive marketplace, we have deferred action on these applications pending review of Columbia's allegations. Based on our review and subsequent events bearing on these issues, we now dismiss Columbia's petitions and grant these applications, which will improve communications between the U.S. and the Russian Federation and other international points.

BACKGROUND

3. Traditionally, satellite services between the U.S. and the countries of the former Soviet Union, including Russia, have been provided using the Intelsat system. However, the establishment of U.S.-licensed international satellite systems separate from Intelsat provided U.S. customers with a choice in the use of space segment capacity for telecommunications services between the U.S. and Russia.[3] This choice has been expanded to permit the use of Intersputnik satellite system capacity to provide various switched and non-switched services between U.S. and Russia. For example, initially we authorized use of the Intersputnik system for television and data service based on a finding that insufficient ground and space segment capacity were available over the world-wide Intelsat system.[4] More recently, we authorized use of the Intersputnik system in an effort to improve the unacceptable quality of telephone service between the U.S. and the Russian Federation, and to meet the rapidly increasing demand for PSN service.[5] We found that the demand for services could not be met solely through use of the Intelsat system and that additional capacity needed to be established using the Intersputnik system.[6]

4. The applications that are the subject of Columbia's petitions seek authority, pursuant to Section 214 and Title III of the Communications Act of 1934, to establish channels of communications between appropriately-licensed earth stations in the United States and the Russian Federation and other locations via the Russian Intersputnik and other satellites of the former Soviet Union.

5. Columbia opposes the authorization of any additional Intersputnik or other Russian satellite capacity because it believes the Russian Federation has engaged in conduct

[1] Because of the number of applications involved, only one application is included in the heading. The remaining applications which are the subject of this order are: IDB WorldCom Services, Inc. (File Nos. I-T-C-91-196, I-T-C-92-164, I-T-C-93-075, I-T-C-94-259 and I-T-C-94-306); MCI Telecommunications Corp. (File No. I-T-C-92-189); AT&T Corp. (File No. I-T-C-93-164); Pacific Gateway Exchange (File No. I-T-C-93-215); Mariga Communications Corporation (File No. I-T-C-94-030); Transworld Communications (U.S.A.), Inc. (File Nos. I-T-C-94-126 and I-T-C-94-159); Micronet, Inc. (File No. I-T-C-94-245); Alascom, Inc. (File No. I-T-C-94-352); Sprint Communications Co., LP (File Nos. I-T-C-94-403 and I-T-C-94-411); Transworld International, Inc. (File No. CSG-94-078-P/L); Cable News Network, Inc. (File No. CSG-94-129-P/L); Micronet, Inc. (File No. CSG-94-096-ML); Bridgewater State College (File No. CSG-95-028-P/L); Melbourne International Communications Limited (File No. CSG-94-088-ML); and Alascom, Inc. (File No. CSG-94-160-P/L). All pending applications filed by IDB Communications Group, Inc. and CICI d/b/a IDB International are authorized under the name IDB WorldCom Services, Inc. as a result of a transfer of control. A description of the services authorized for each application is set forth in the ordering clauses. We are aware that authority to use Russian satellites may have been deferred in previous Commission orders in which requests to use non-Russian facilities were granted. We will address those deferred requests in a subsequent order.

[2] In addition to the appropriate Russian regulatory approvals, "landing rights" also involves completion of the Intelsat Article XIV(d) consultation process by which a country agrees to permit use of a foreign satellite for international service between that country and other international locations. Under Article XIV(d) of the Intelsat Agreement, a Party or Signatory that desires to use non-Intelsat space segment (*i.e.*, a "separate system") for the provision of public international telecommunications service must consult with Intelsat to determine if the use of non-Intelsat space segment will cause either technical or significant economic harm.

[3] Establishment of Satellite Systems Providing International Communications, 101 F.C.C.2d 1046 (1985) (*"Separate Systems Decision"*), *recon.*, 61 R.R.2d 649 (1986), *further recon.*, 1 F.C.C. Rcd. 439 (1986).

[4] IDB Communications Group, Inc. *et al.*, 6 FCC. Rcd. 2932 (1991).

[5] American Telephone and Telegraph Co. *et al.*, 8 FCC. Rcd. 2668, 2669 (1993).

[6] *Id.*

designed to prevent additional entrants into its market for international telecommunications services. Columbia cites its unsuccessful efforts over a three-year period to obtain "landing rights" to offer low-cost business telecommunications services to, from, and within Russia.[7] Columbia believes that the lack of Russian interest in its business proposal there stems from a "desire to keep American satellite capacity providers from competing with Russian telecommunications ventures" in which prominent Russian Government officials may have a direct financial interest.[8] Columbia also suggests that its inability to gain landing rights stems from its refusal to offer the same financial inducements as other companies seeking to do business in Russia. Thus, Columbia requests that the Commission authorize no additional access to U.S. markets by the Russian Federation via any Russian satellite facilities until U.S. international separate systems are granted unfettered access to Russian international telecommunications markets. Columbia also suggests that the Commission refer this matter to the Department of State.

6. The applicants cite a number of reasons why the applications should be granted and suggest reasons, other than those described by Columbia, to explain Columbia's difficulties. First, the applicants observe the need for improved communications between the U.S. and Russia, and note that use of the Intersputnik satellite system is consistent with our *Separate Systems Decision*. They also note that the evidence does not indicate a Russian policy to exclude non-Russian satellite systems from operating within Russia. For example, they point out that the Intelsat and Eutelsat satellite systems provide service to Russia, and that PanAmSat, a U.S.-licensed international separate satellite system, has "landing rights" to provide U.S.-Russia service. One applicant suggests Columbia's difficulties may stem from slow-moving Russian bureaucracy, Columbia's unfamiliarity with the Russian telecommunications structure, and the fact that Columbia dealt with a private entity and not the Russian government. Another applicant points out that Columbia seeks to use U.S. transponders to provide domestic services within Russia, which is a greater right than has been granted to foreign-owned satellites in connection with the U.S. domestic market. Another asserts that Columbia lacks standing to object to its specific application because Columbia's system cannot provide the service proposed in that application.[9]

DISCUSSION

7. Underlying U.S. international satellite policy is the establishment of a competitive environment that provides customers with increased service options and lower prices. We have extended our Separate Systems Policy to allow use of non-U.S. satellite systems such as Intersputnik where such use is required to satisfy traffic demand that other international systems could not address. In view of these policies, we are concerned if any U.S. satellite provider is denied access to a country, particularly where the satellite systems of that country are permitted access to the U.S. international market. In this case, however, we find no lack of reciprocal access to the Russian Federation for U.S.-licensed satellite systems.

8. To begin with, Columbia has not presented us with any specific regulatory policy or decision of the Russian Federation that denies Columbia the ability to provide service between the U.S. and Russia. We note that no U.S. carrier has applied to us for authority to serve Russia via the Columbia system. Moreover, Columbia states that it knows of no similar application pending before any governmental entity within Russia. Columbia's inability to point to any specific regulatory denial has made it difficult for us even to define the alleged exclusion from the Russian market, let alone determine its causes.

9. As Columbia suggested, we sought the views of the Department of State on the issues raised by Columbia.[10] In response, the State Department advised that there are "no fundamental foreign policy reasons which would lead the Russian Federation or the United States to deny use of each other's satellite systems for commercial uses."[11] The State Department also referred to a letter to Columbia from the Russian Federation's Signatory to Intelsat, the Russian Satellite Communications Company, confirming that it was prepared to support a consultation for Columbia to provide U.S.-Russia service if Columbia provided confirmation of commercial demand for use of its system.[12]

10. We also raised Columbia's concerns directly with representatives of the Russian Federation in bilateral discussions held in March 1995. In response to our inquiry, the Ministry of Posts and Telecommunications of the Russian Federation denied in writing the existence of any "special" policy governing the provision of satellite capacity between the U.S. and the Russian Federation. On the contrary, the letter stated that, in addition to Intelsat and Intersputnik satellites, service between the U.S. and the Russian Federation has been provided by the Aurora satellite system operated by Alascom, a U.S. company.

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[7] Columbia's Petition to Deny or Defer Action in application File No. CSG-94-078-P/L (May 13, 1994).

[8] *Id.*

[9] Whether Columbia has standing was raised in the context of a single application for service to be provided by Alascom, Inc. and has not been raised generally in connection with all of the applications. Because our resolution of Columbia's other petitions on the merits effectively disposes of the petition to deny Alascom's application as well, we need not reach the question of standing Alascom has raised.

[10] Letter from A. Richard Metzger, Acting Chief, Common Carrier Bureau, F.C.C. to Richard C. Beaird, Senior Deputy U.S. Coordinator and Director, Bureau of International Communications and Information Policy, Department of State (June 17, 1994).

[11] Letter from Michael T.N. Fitch, Deputy U.S. Coordinator, International Communications and Information Policy to Kathleen Wallman, Chief, Common Carrier Bureau, FCC. (September 2, 1994).

[12] Moreover, we note that recent action by Intelsat has removed the necessity of Columbia completing any further consultation, under Article XIV(d) of the Intelsat Agreement, for the provision of service between the U.S. and the Russian Federation. Intelsat has now determined that once a satellite is "consulted" for one country under Article XIV(d), it is deemed consulted for all locations unless a particular country objects to its use. Since Columbia's satellites have been consulted to a number of countries, they are now deemed consulted for the Russian Federation also. There has been no objection from the Russian Federation to the use of Columbia's system. Under the new Intelsat procedures, such an objection would likely arise, if at all, once Columbia has a customer.

11. Finally, closer scrutiny of the information provided by Columbia reveals that a significant aspect of Columbia's initial proposals to provide service to the Russian Federation involved domestic service solely within the Russian Federation, not international service. This distinction is significant because non-U.S. satellites currently are not permitted to serve the U.S. domestic market absent a showing that U.S. domestic satellite capacity is inadequate to satisfy a particular requirement.[13] Thus, we find no lack of reciprocal access with respect to this aspect of Columbia's argument.

12. In summary, Columbia can point to no specific governmental decision or policy to substantiate its claim that the Russian government is responsible for keeping Columbia out of the Russian market. Nor have our investigations, or those of the State Department, uncovered any official policy restricting Columbia's ability to provide service between the U.S. and Russia. Under these circumstances, we find no reason to continue to delay the processing of these applications which will allow additional capacity to be authorized to address the unacceptable level of quality of telecommunications service between the U.S. and the Russian Federation and the increasing demand for such services. We will continue to monitor this situation, particularly if an application is filed to use Columbia's system for service between the U.S. and the Russian Federation and service is not permitted to be implemented.

13. Accordingly, IT IS ORDERED that the applications set forth below ARE GRANTED and:

a. IDB WorldCom Services, Inc. is authorized to: (File No. I-T-C-91-196) establish a total of 100 64-kbps channels of communication via the Russian Statsionar 11 satellite located at 11^0 W.L. between the appropriately licensed earth stations in the U.S. and similar facilities in those countries that constituted the former Soviet Union; (File No. I-T-C-92-164) establish channels of communication (two 36-MHz video channels and six T-1 circuits) via the Statsionar 10 satellite located at 170^0 W.L. between appropriately licensed earth stations in the U.S. and Russia for the provision of television and private line services; (File No. I-T-C-93-075) establish channels of communication (two 36-MHz video channels, 5 T-1 circuits and five 15-kHz program audio channels) via the Statsionar 11 satellite located at 11^0 W.L. between appropriately licensed earth stations in the U.S. and each of the locations set forth in its application for the provision of private line, television, and program audio services; (File No. I-T-C-94-259) establish channels of communication (two 36-MHz video channels, 5 T-1 circuits and five 15-kHz program audio channels) via the Statsionar 4 satellite located at 14^0 W.L. between appropriately licensed earth stations in the U.S. and each of the locations set forth in its application for the provision of private line, television and program audio services; and (File No. I-T-C-94-306) establish channels of communication via the Statsionar 4 satellite located at 14^0 W.L. between appropriately licensed earth stations in the U.S. and Algeria (15 64-kbps circuits), Madagascar (30 64-kbps circuits), Syria (15 64-kbps circuits) and Zimbabwe (15 64-kbps circuits), for the provision of switched voice services.

b. MCI Telecommunications Corp. (File No. I-T-C-92-189) is authorized to resell the services of IDB WorldCom Services, Inc. (formerly IDB Communications Group, Inc.) for the provision of its authorized services, including switched voice service, between the U.S. and the countries of the former Soviet Union.

c. AT&T Corp. (File No. I-T-C-93-164) is authorized to establish channels of communication via the Russian Statsionar 4 satellite located at 14^0 W.L. between AT&T's Roaring Creek, Pennsylvania earth station and Nicaragua (sixty 64-Kbps circuits) and Bulgaria (thirty 64-kbps circuits) for the provision of its authorized services.[14]

d. Pacific Gateway Exchange (File No. I-T-C-93-215) is authorized to establish channels of communication (thirty 64-kbps circuits) via the Statsionar 4 satellite located at 14^0 W.L. between appropriately licensed earth stations in the U.S. and countries of the former Soviet Union for the provision of switched and private line services.

e. Mariga Communications Corporation (File No. I-T-C-94-030) is authorized to establish channels of communication (One 1.544 Mbps circuit) via the Statsionar 11 satellite located at 11^0 W.L. between appropriately licensed earth stations in the U.S. and the Russian Federation for the provision of private line service.

f. Transworld Communications (U.S.A.), Inc. (File No. I-T-C-93-159) is authorized to establish channels of communications (thirty 64-kbps circuits) via the Statsionar 4 satellite located at 14^0 W.L. between appropriately licensed earth stations in the U.S. and the Russian Federation for the provision of public switched services;[15] and (File No. I-T-C-94-126) establish channels of communication (two 36-MHz channels and two T-1 channels) via the WSDRN satellite between appropriately licensed earth stations in the U.S. and countries within the footprint of the WSDRN satellite.

g. Sprint Communications Company, L.P. (File No. I-T-C-94-403) is authorized to establish channels of communication via the Statsionar 4 satellite located at 14^0 W.L. between appropriately licensed earth stations in the U.S. and various countries for the provi-

[13] In a recent Notice of Proposed Rulemaking that proposes to subject all U.S.-licensed satellites to the same regulatory policy, we asked for comment on whether, and under what conditions, non-U.S. satellites should be permitted to serve the U.S. domestic market. *See* Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, FCC 95-146, released April 25, 1995.

[14] For U.S.-Bulgaria service, AT&T requests that 30 of the 230 allocated to it for service between the U.S. and the Russian Federation be reallocated for service toh) Bulgaria. *See* American Telephone & Telegraph, et al., 8 F.C.C. Rcd. 2668 (1993).

[15] The thirty circuits authorized herein were revoked from authorized carriers whose allocated circuits were not in use. *See* Transworld Communications (U.S.A.), Inc., DA No. 95-758, released April 11, 1995).

sion of public switched services (207 total 64-kbps circuits) and non-switched services (213 total 64-kbps circuits); and (File No. I-T-C-94-411) establish channels of communication (thirty 64-kbps circuits) via the Statsionar 4 satellite located at 14^0 W.L. between appropriately licensed earth stations in the U.S. and Bulgaria for the provision of its authorized services, including switched voice service.

h. MicroNet, Inc. (File No. I-T-C-94-245) is authorized to establish channels of communications via the Statsionar 4 an 11 satellites between appropriately licensed earth stations in the U.S. and the Russian Federation for the provision of private line video, voice, and data services not interconnected with the public switched network.

i. Alascom, Inc. (File No. I-T-C-94-352) is authorized to establish up to 1,250 64-Kbps equivalent channels via the Ghorizont 21 satellite between its fixed transmit/receive earth station located at Diamond Ridge, Alaska and points in Russia for the provision of switched message and private-line services.

j. Transworld International, Inc. (File No. CSG-94-078-P/L) is authorized to construct and operate a 4.8 meter receive-only fixed international earth station at Alexandria, Virginia in the 10.81-10.86 GHz frequency band to provide video and data services via the WSDRN satellite located at 16^0 W.L. consistent with the technical parameters set forth in its application.

k. Cable News Network, Inc. (File No. CSG-94-129-P/L) is authorized to construct and operate a 4.8 meter receive-only fixed international earth station at Atlanta, Georgia in the 10.81-10.86 GHz frequency band to receive video and associated audio signals from WSDRN satellite located at 16^0 W.L. consistent with the technical parameters set forth in its application.

l. Micronet, Inc. (File No. CSG-94-096-ML) is authorized to use its international earth station (KA330) located at Glenwood, New Jersey to communicate with the Russian Statsionar 4 satellite located at 14^0 W.L. and the Statsionar 11 satellite at 11^0 W.L. in the Intersputnik system for the provision of private line video, voice and data services consistent with the technical parameters set forth in its application.

m. Bridgewater State College (File No. CSG-95-028-P/L) is authorized to construct and operate an 11-meter C-band transmit/receive international earth station at Bridgewater (Plymouth), Massachusetts to communicate with the Statsionar 4 satellite located at 14^0 W.L. for the provision of video, with associated audio and data services, consistent with the technical parameters set forth in its application.

n. Melbourne International Communications Limited (File No. CSG-94-088-ML) is authorized to use its international earth station (KA354) located at Palm Bay (Brevard), Florida to communicate with the Russian Statsionar 4 satellite located at 14^0 W.L. and the Statsionar 11 satellite at 11^0 W.L. in the Intersputnik system for the provision of video and data services consistent with the technical parameters set forth in its application.

o. Alascom, Inc. (File No. CSG-94-160-P/L) is authorized to construct and operate a 9.1-meter, C-band earth station at Diamond Ridge, Alaska to communicate with the Russian Statsionar 16 satellite at 215^0 W.L. for the provision of video and data services consistent with the technical parameters set forth in its license.

14. IT IS FURTHER ORDERED that circuits authorized herein are subject to the limits set forth in existing Intelsat Article XIV(d) consultations for each satellite consistent with Separate Systems Policy.

15. This authorization is issued pursuant to Section 0.261 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-30

In the Matter of

Amendment of Section 73.202(b), RM-8599
Table of Allotments,
FM Broadcast Stations.
(Harwood, North Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 26, 1995; Released: July 5, 1995

By the Chief, Allocations Branch:

1. At the request of Conway Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 10 FCC Rcd 2303 (1995), proposing the allotment of Channel 264C3 to Harwood, North Dakota, as the community's first local aural service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted.[1] No other comments were received.

Technical Summary

2. Channel 264C3 can be allotted to Harwood in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.7 kilometers (9.1 miles) southwest to avoid a short-spacing to Station KIKV-FM, Channel 264C1, Alexandria, Minnesota.[2] Canadian concurrence in the allotment has been received since Harwood is located with 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by allotting Channel 264C3 to Harwood since it could provide the community with its first local aural service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 21, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Harwood, North Dakota	264C3

4. The window period for filing applications will open on **August 21, 1995**, and close on **September 21, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Although petitioner's comments were late filed, we will accept them for purposes of expressing continuing interest. Generally, the Commission does not accept late-filed comments unless there is no opposition to the proposal and the acceptance would not have an adverse effect upon another pending, acceptable proposal. Here, there is no opposition to the Harwood allotment and the allotment would cause no adverse impact on any other pending proposal.

[2] The coordinates for Channel 264C3 at Harwood are 47-05-00 North Latitude and 97-00-00 West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-194

In the Matter of

Amendment of Section 73.202(b),	RM-8052
Table of Allotments,	RM-8121
FM Broadcast Stations.	
(Essex and Needles, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 23, 1995; Released: July 5, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 5912 (1993), proposing the allotment of Channel 280B to Essex, California, as that community's second local FM service, in response to a request filed on behalf of Dunes Broadcasting. Petitioner filed supporting comments reiterating its intention to apply for Channel 280B, if allotted to Essex, as requested. Comments and a counterproposal were filed on behalf of David A. Petrick ("Petrick").[1] Responsive comments were filed by petitioner, Petrick and Chris Sarros ("Sarros").[2]

2. In response to the *Notice*, Petrick counterproposed the allotment of Channel 280B to Needles, California, in lieu of its consideration at Essex.[3] In support of his proposal, Petrick identifies Needles as a "growing community with a 1990 U.S. Census population of over 5,000 persons." In further support of his proposal Petrick questions the community status of Essex for allotment purposes, regardless of the fact that it was previously allotted an FM channel. Petrick remarks that Essex is merely a geographical locality having no meaningful population and lacking the commonly recognized attributes of a community, citing *Hannahs Mill, Georgia*, 7 FCC Rcd 3944 (1992) and *East Hemet, California*, 4 FCC Rcd 7895 (1989). Further, Petrick comments that although the *Notice* did not request demographic information, presumably since Essex has an FM allotment, due to changed circumstances in the composition of the community since the earlier FM allotment was made, and in the absence of a further demonstration by the petitioner that Essex merits community status, the proposal should be denied, regardless of whether there may be any mutually-exclusive proposal under consideration.

3. The requests to allot Channel 280B to Essex and to Needles are mutually exclusive as they are separated by less than the required minimum distance of 241 kilometers between Class B co-channel allotments. As indicated in footnote 3, *supra*, in an effort to accommodate both proposals, the staff determined the availability of another Class B channel (Channel 296B) to accommodate Petrick's desire to provide an additional FM service to Needles.[4] Therefore, we are not required to address Petrick's counterproposal further. However, in light of Petrick's allegations surrounding the community status of Essex for allotment purposes, we believe it is necessary to distinguish the instant proposal from proceedings in which the Commission has reversed its presumption of community status.

4. We note that in 1988, the Commission considered a request to allot an FM channel to Essex based upon the petitioner's intention to serve not only the needs and interests of that locality, but also to provide a much needed service to the large mobile population travelling daily in remote areas along Interstate 40. *See* 3 FCC Rcd 5403 (1988). In making the ultimate determination to allot an FM channel to Essex in MM Docket No. 88-397, the Commission stated that "Congressional intent in enacting Section 307(b) of the Communications Act in its present form was to provide the Commission with greater discretion in distributing frequencies, and to remove uniform but somewhat artificial barriers to the initiation of service in sparsely populated areas," citing, *e.g.*, H.R. Rep. No. 2589, 74th Cong., 2nd Sess. 3 (1936). *See* 4 FCC Rcd 8084 (1989). Although Essex may contain a small population, it is located in a portion of California near the Nevada border, as is Needles, which is sparsely populated with few significant communities. If we were to deny the Essex proposal based upon Petrick's assertions, we would simply frustrate Congress' intent in enacting Section 307(b) of the Communications Act. Moreover, we previously found in the 1988 proceeding, *supra*, that Essex qualified as a community for allotment purposes and a construction permit has been issued for Station KHWY(FM) to operate on Channel 255B at Essex. As none of the cases cited by Petrick involved the denial of an allotment to a community containing authorized broadcast facilities, we find no justifiable reason to challenge the petitioner's request to allot Channel 280B to Essex.

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[1] Public Notice of the counterproposal was given November 20, 1992, Report No. 1918.

[2] Sarros was the petitioner to allot Channel 280A to Bagdad, Arizona, in MM Docket No. 92-48. As his comments relate solely to Petrick's suggested substitution of a channel at Bagdad to accommodate the counterproposal in this proceeding, they are moot in view of the determination reached in MM Docket No. 92-48 to allot Channel 280A to Bagdad. See footnote 3, *infra*. Therefore, Sarros' comments will not be discussed in this proceeding. *See* 8 FCC Rcd 2168 (1993).

[3] To accommodate his proposal, Petrick also requested the substitution of Channel 242A for Channel 280A at Bagdad, Arizona, in MM Docket No. 92-48. Petrick's counterproposal was filed after the close of the comment period in the Bagdad proceeding, and could not be considered therein. However, in MM Docket No. 92-48 we stated that in an effort to accommodate all parties, an alternate Class B channel was found to be available for consideration at Needles, and would be addressed in the context of the instant proceeding. *See* 8 FCC Rcd 2168 (1993). We wish to clarify, however, that had an alternate channel not been available for consideration at Needles, Petrick's counterproposal would have been rejected in this proceeding as counterproposals must be technically and procedurally correct at the time of their filing. *See Fort Bragg, California*, 6 FCC Rcd 5817 (1991).

[4] In light of the availability of an alternate channel at Needles, petitioner's comments in reference to Petrick's counterproposal are now moot and will not be discussed.

5. In view of the above, we believe the public interest would be served by the allotment of Channel 280B to Essex, California, and Channel 296B to Needles, California, since the proposals could provide an additional local FM service to each community. As indicated in the *Notice*, Channel 280B can be allotted to Essex without a site restriction, at coordinates 34-44-12 and 115-14-48. Channel 296B can be allotted to Needles without the imposition of a site restriction at coordinates 34-50-36 and 114-36-54. As Essex and Needles are each located within 320 kilometers (199 miles) of the United States-Mexico border, concurrence in the proposals was obtained from the Mexican government.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED. That effective **August 21, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with regard to the communities listed below, as follows:

City	Channel No.
Essex, California	255B, 280B
Needles, California	250C1, 296B

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. The window period for filing applications on Channel 280B at Essex, California, and on Channel 296B at Needles, California, will open on **August 21, 1995**, and close on **September 21, 1995**.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for Channel 280B at Essex, California, and Channel 296B at Needles, California, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-58

In the Matter of

Amendment of Section 73.202(b),	RM-7419
Table of Allotments,	RM-7797
FM Broadcast Stations.	RM-7798
(Caldwell, College Station and Gause, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 23, 1995; Released: July 5, 1995

By the Chief, Allocations Branch:

1. At the request of Roy E. Henderson ("Henderson"), the Commission has before it the *Notice of Proposed Rule Making* in this proceeding, 6 FCC Rcd 1551 (1991), proposing the substitution of Channel 236C2 for Channel 236A at Caldwell, Texas, and the modification of the construction permit of Station KHEN, Channel 236A, Caldwell, Texas, to specify operation on Channel 236C2.[2] Henderson and Hicks Broadcasting Corporation ("Hicks") filed comments and reply comments.[3] Hicks filed an "Erratum" to its reply comments. Henderson filed an Opposition to the Acceptance of Erratum, and Hicks filed a Reply to that Opposition. Val-Jo Communications, Inc. ("Val-Jo") filed a Request for Leave to Submit Late-Filed Comments and Counterproposal and Comments and Counterproposal. Henderson and Hicks filed Oppositions to the Request for Leave. Val-Jo filed a Reply to the Oppositions. Hicks filed a Petition for Leave to File Supplementary Comments and Supplementary Comments. Val-Jo filed an Opposition to the Petition for Leave. Hicks filed a Reply to that Opposition. Henderson filed a Supplemental Information Response. Bryan Broadcasting, L.C. ("Bryan Broadcasting") filed an Opposition to Supplemental Information, and Henderson filed a Reply to that Opposition. Bryan Broadcasting filed Supplemental Information and a Supplemental Response to Reply. Henderson filed a Motion to Strike directed to the Bryan Broadcasting Supplemental Response to Reply. Bryan Broadcasting filed an Opposition to Motion to Strike and Henderson filed a Reply to that Opposition. Val-Jo filed a Petition for Withdrawal of Objection. Henderson filed an Opposition to the Val-Jo Petition for Withdrawal of Objection. Val-Jo filed a Reply to that Opposition and Henderson filed a Limited Response to Reply to Opposition.[4] Finally, Henderson and Bryan Broadcasting each filed a Response to an *Order to Show Cause*. For the reasons discussed below, we are granting the proposed upgrade for Station KTSR at College Station, Texas.

BACKGROUND

2. As discussed earlier, the *Notice* proposed the substitution of Channel 236C2 for Channel 236A at Caldwell, Texas, and the modification of the Station KHEN construction permit to specify operation on Channel 236C2. In response to the *Notice*, we received two counterproposals. The first counterproposal was submitted by Henderson proposing, as an alternate to its Caldwell upgrade proposal, the substitution of Channel 236C2 for Channel 236A at Caldwell, and the reallotment of the channel to Gause, Texas.[5] The second counterproposal was submitted by Hicks proposing the substitution of Channel 236C2 for Channel 297C3 at College Station, Texas, and the modification of its

[1] The communities of Gause and College Station have been added to the caption.

[2] Henderson is now the permittee of Station KHEN, Caldwell, Texas. Earlier, Henderson filed a petition for rule making in conjunction with MM Docket No. 88-48, but was not considered in that proceeding. The Commission concurred with the staff determination that the petition for rule making was defective because the proposed transmitter site did not comply with the Commission's minimum spacing requirements and Henderson was not a permittee at the time he purportedly filed the petition for rule making. 8 FCC Rcd 4281 (1993). Subsequently, Henderson became the permittee of Station KHEN on December 16, 1988. Thereafter, he submitted an "Amendment" supplementing his earlier petition for rule making. Inasmuch as he was then the permittee of Station KHEN and the coordinates set forth in the "Amendment" complied with the minimum spacing requirements, the "Amendment" is being processed as a petition for rule making filed December 19, 1988.

[3] Hicks was the licensee of Station KTSR, Channel 297C3, College Station, Texas. On April 19, 1992, the Station KTSR license was assigned to Bryan Broadcasting, L.C. (File No. BALPH-920106HV).

[4] In its comments, Hicks proposed a Channel 236C2 upgrade for Station KTSR in College Station and an accommodating Channel 297A substitution at Caldwell. In order to allot Channel 297A to Caldwell, Texas, Hicks proposed a site restriction on the Channel 297A allotment at Nolanville, Texas. At the time Val-Jo filed its Comments and Counterproposal, it was an applicant for the Channel 297A allotment at Nolanville. In addition to an argument concerning the technical feasibility of such a site restriction, Val-Jo suggested an alternate Channel 274A substitution for Caldwell. Subsequently, Val-Jo became the permittee of Station KLFX (now KKFF), Channel 297A, Nolanville (File No. BMPH-930416IB) using the equivalent protection criteria set forth in Section 73.215 of the Rules with respect to a Channel 297A allotment in Caldwell. On March 27, 1995, we granted the covering license application (File No. BLH-941117KC). As such, there is no longer any need for a site restriction on the Nolanville allotment, and the Nolanville allotment will not be considered further in this proceeding. Finally, we note that the construction permit had been assigned on July 20, 1994, to Sheldon Broadcasting, Ltd. (File No. BAPH-940503GN).

[5] In his Reply Comments, Henderson specifically states that it would be "the better course to remain with the original proposal" for a Channel 236C2 upgrade at Caldwell. Accordingly, we will not consider any proposal for Gause or the comments in opposition to a Gause allotment. In this regard, we note that the proposed reallotment would have removed the only authorized service to a community of 26,392 persons, and reallotted the channel to an unincorporated community of approximately 500 persons. In such a situation, we would not have been able to make the requisite finding that this would be a preferential arrangement of channels. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon* 5 FCC Rcd 7094 (1990).

Station KTSR license to specify operation on Channel 236C2. In order to accommodate the proposed Channel 236C2 upgrade at College Station, Hicks also proposed the substitution of Channel 297A for Channel 236A at Caldwell, Texas.[6]

Caldwell Upgrade

3. In its Comments as well as its Reply Comments filed May 21, 1991, Hicks contends that Henderson's Caldwell upgrade proposal would not provide the requisite 70 dBu signal to all ofCaldwell as required by Section 73.315 of the Commission's Rules.[7] In its Reply Comments, Hicks notes that under average terrain, the predicted 70 dBu contour of a Class C2 FM facility operating with maximum facilities will extend 32.6 kilometers. In this situation, the Channel 236C2 upgrade proposal for Caldwell requires a site restriction of 32.7 kilometers (20.3 miles) northeast. As such, Hicks claims that the Caldwell proposal would not comply with the principal city coverage requirement set forth in Section 73.315(a) of the Rules.[8] In this regard, Hicks contends that Henderson has shown no basis to utilize actual terrain to support his position that the 70 dBu contour of his Caldwell proposal will, in fact, extend 34.9 kilometers. Even assuming the 34.9-kilometer distance to be correct, Hicks has included a map depicting the city boundaries of Caldwell and this 70 dBu contour. According to this exhibit, the 70 dBu contour does not encompass all of Caldwell. On the other hand, Henderson has submitted a map depicting the same 70 dBu contour, but with slightly different city boundaries. According to the Henderson exhibit, the 70 dBu contour does encompass all of Caldwell.

Request for Supplemental Information

4. In view of this discrepancy, we issued a *Request for Supplemental Information*, 7 FCC Rcd 1905 (1992), requesting specific information from both parties as to the actual and current city boundaries of Caldwell. In response to the *Request for Supplemental Information*, Bryan Broadcasting filed a Supplemental Information and Henderson filed a Supplemental Information Response.[9] In this regard, Bryan Broadcasting submitted a map depicting the city boundaries of Caldwell along with a statement from the Caldwell City Engineer confirming that the depicted city boundaries are current and accurate. Bryan Broadcasting also stated that the city map of Caldwell submitted by Henderson corresponds to the January 1954 city map of Caldwell. In his response, Henderson submitted a recent map of Caldwell indicating that less than 4% of the area of Caldwell and a maximum of 25 of its residents are located outside of the proposed principal city contour. Also, Henderson states that the area in question "appears to be some type of industrial park." In this connection, Henderson makes three observations. First, Henderson argues that under Section 73.1560(b) of the Rules, he could operate Station KHEN at a power 5% above the authorized power which, in turn, would achieve compliance with the principal city coverage requirement of Section 73.315(a) of the Rules. Second, Henderson states that the USGA map of Caldwell was "modified" between 1989 and 1990 to "slightly" enlarge the city boundaries of Caldwell. As such, Henderson contends that his proposal should be favorably considered because it was in compliance with the principal city coverage at the time it was filed. Finally, Henderson contends that his proposal is in "substantial" compliance with Section 73.315(a) and should be favorably considered consistent with similar proposals in the application context.

5. In response to these arguments, Bryan Broadcasting disputes the computation of the population located outside of the 70 dBu contour, the location of this contour, and any suggestion that the Henderson proposal was in compliance with Section 73.315(a) at the time he originally filed his proposal. Specifically, Bryan Broadcasting contends that the portion of Caldwell outside of Henderson's predicted 70 dBu contour consists of 82 single family dwellings, the Burleson County Hospital, the County Health Clinic, a pharmacy, a dental clinic, a motel, a low income housing apartment complex, and a fencing contractor. In regard to the location of the actual 70 dBu contour, Bryan Broadcasting argues that under the requirements set forth in *Woodstock and Broadway, Virginia*, 65 RR 2d 713 (1988), Henderson cannot use actual terrain in order to show that his predicted 70 dBu contour actually extends 34.9 kilometers.[10] In this connection, Bryan Broadcasting states, contrary to an earlier representation by Henderson, that

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[6] Public Notice of these counterproposals was given on September 11, 1991. (Report No. 1860). In this situation, Hicks' proposed nonadjacent Channel 236C2 upgrade at College Station may be done without opening Channel 236C2 to competing applications. This is because this is an incompatible channel swap between Channel 297 at College Station and Channel 236 at Caldwell. *See Modification of FM Broadcast Licenses to Higher Class Co-Channel and Adjacent Channels*, 60 RR 2d 114, 120 (1986). *See also Clincho, Virginia*, 6 FCC Rcd 3732 (1991). In this regard, there are no other channels available to Caldwell that could be accommodated at the authorized Station KHEN transmitter site.

[7] On May 22, 1991, Hicks filed an "Erratum" to its Reply Comments which consisted of an engineering exhibit which was inadvertently not included in its Reply Comments filed the day earlier. The date for filing reply comments in MM Docket No. 91-58 was May 21, 1991. Henderson filed an Opposition to Acceptance of Erratum. In his Opposition, Henderson contends that Hicks has not shown good cause for the acceptance of an untimely supplement to its Reply Comments. We will consider the engineering exhibit because it pertains to the issue of principal city coverage. The issue of principal city coverage was raised by Hicks in timely Comments and Reply Comments. This exhibit will enable us to fully consider the issue of principal city coverage and will not delay resolution of this proceeding. For these reasons, we will also consider the engineering exhibit submitted by Henderson in his Opposition.

[8] Section 73.315(a) of the Commission's Rules requires an FM station to provide an entire community of license with a 70 dBu signal.

[9] In addition, Bryan Broadcasting filed an Opposition to the Supplemental Information Response of Henderson and a Supplemental Response to the Henderson Reply to its Opposition. Henderson filed a Reply to the Bryan Broadcasting Opposition, a Motion to Strike the Bryan Broadcasting Supplemental Response to Reply. For the reasons discussed earlier, we will consider all engineering submissions filed by Henderson and Bryan Broadcasting pertaining to the issue of principal city coverage of Caldwell.

[10] In predicting the propagation of an FM service contour, we assume uniform terrain. In *Woodstock*, the Commission provided for an exception to its assumption of uniform terrain. In order to comply with the *Woodstock* exception, a rule making proponent must, in addition to depicting actual terrain, demonstrate a reasonable assurance of the availability of the pro-

the owner of the proposed transmitter site, Chet Fry, has given no such assurance and, in fact, specifically advised Henderson that he would not permit a high-powered FM station on his property. Henderson has not obtained FAA approval or depicted actual terrain. In regard to Henderson's argument that his proposal was in compliance with Section 73.315(a) with respect to the city boundaries that existed when he filed his proposal in 1988, Bryan Broadcasting has submitted a letter from the Caldwell City Engineer stating that the last change in the incorporated city boundaries of Caldwell occurred in 1981.

6. The proposed Channel 236C2 upgrade for Caldwell does not comply with Section 73.315(a) of the Rules and cannot be favorably considered in the context of a comparative rule making proceeding. We are making this determination even if we were able to assume that the predicted 70 dBu contour would extend 34.9 kilometers and thereby encompass 96% of Caldwell.[11] However, there are several observations that we would like to make concerning the proposed Caldwell upgrade. First, Henderson, in his original proposal filed in 1988, did not accurately represent the current city boundaries of Caldwell. These boundaries appear to have been changed seven years earlier. At the time he filed his upgrade proposal, he was the permittee of Station KHEN in Caldwell and should have been aware of the current city boundaries. Furthermore, Hicks filed comments and reply comments in May of 1991 arguing that the Caldwell upgrade proposal did not comply with Section 73.315(a) of the Rules. It was readily apparent that the city boundaries used by Henderson and Hicks were not identical. At that juncture, it was incumbent upon both parties to take steps to verify the accuracy of their respective submissions. Henderson did not do so until we issued the aforementioned *Request for Supplemental Information* on March 13, 1992, directing both parties to submit information concerning the actual and current city boundaries of Caldwell. This does not represent the degree of diligence that we expect from a rule making proponent.[12]

ORDER TO SHOW CAUSE

7. On August 23, 1994, we released an *Order to Show Cause* directed to Henderson to show cause why his Station KHEN construction permit should not be modified to specify operation on Channel 297A in order to accommodate the proposed upgrade at College Station. 9 FCC Rcd 4425 (1994). In doing so, we specifically stated that this action was necessary in order to enable us to select between the competing Caldwell and College Station upgrades. In response, Henderson again argues the comparative merits of the Caldwell upgrade in relation to the College Station upgrade. In a separate context, Henderson refers to the ownership interests of Bryan Broadcasting principals in other broadcast stations in Texas to support his conclusion that the College Station upgrade would have a "severe monopolistic impact" and perpetuate a "stranglehold of media coverage." Finally, Henderson refers to the earlier efforts in MM Docket No. 88-48 to obtain upgrades for Caldwell and College Station. As part of the settlement in that proceeding, Hicks agreed to a Channel 297C3 upgrade at College Station instead of its originally requested Channel 235C2 upgrade. According to Henderson, Bryan Broadcasting "abandoned" an earlier commitment to upgrade on Channel 297C3 in order to "block" his proposal to upgrade on Channel 236C2 in Caldwell. We will consider these responses in conjunction with our consideration of the mutually exclusive Caldwell and College Station upgrade proposals.

DISCUSSION

8. As stated earlier, we are substituting Channel 236C2 for Channel 297C3 at College Station, and are modifying the Station KTSR license to specify operation on Channel 236C2.[13] In order to accommodate this upgrade, we are also substituting Channel 297A for Channel 236A at Caldwell, and are modifying the construction permit of Station KHEN to specify operation on Channel 297A.[14] We are making this determination pursuant to the FM allotment priorities set forth in *Revision of FM Policies and Procedures (FM Priorities")*, 90 FCC 2d 88 (1982), which are as follows:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service; and

(4) Other public interest matters.

[Co-equal weight given to Priorities (2) and (3)]

In considering these competing proposals under Priority 4, we undertook our own engineering analysis of both upgrades. In doing so, we first determined that the proposed upgrade at Caldwell would serve 48,755 additional persons, while the proposed upgrade at College Station would provide service to 22,908 additional persons. A comparison of these populations favors the Caldwell upgrade even though the population within the gain area already receives a minimum of six aural services. However, we are granting

posed transmitter site from the owner and that FAA approval for the tower has been obtained. Henderson has not complied with any of these requirements.

[11] As noted earlier, Henderson has not complied with the requirements set forth in *Woodstock* in order to assume a 70 dBu contour extending 34.9 kilometers. Based on the Commission presumption of average terrain, the 70 dBu contour extends 32.6 kilometers and covers little, if any, of Caldwell. Allotting Channel 236C2 to Caldwell under these circumstances would both undermine the Commission's prediction methodology and compromise the integrity of the Commission's system of allotting FM channels. *See Sonora, California*, 6 FCC Rcd 6042 (1991).

[12] In addition, Henderson mischaracterizes Section 73.1560(b) of the Commission's Rules which specifically requires an FM station to maintain its output power "as near as practicable" to its authorized power. The provision for an operation between 90 and 105% of this power is merely to allow for a temporary fluctuation of output power which is usually caused by a fluctuation in the powerline voltage. Contrary to the statement by Henderson, Section 73.1560(b) does not, in any way, permit an FM station to operate in excess of its authorized power in order to comply with the principal city coverage requirement of Section 73.315(a) of the Rules.

[13] The reference coordinates for Channel 236C2 at College Station, Texas, are 30-49-00 and 96-25-00.

[14] The reference coordinates for Channel 297A at Caldwell, Texas, are 30-33-31 and 96-34-50. In accordance with *Circleville, Ohio*, 8 FCC 2d 159 (1967), Bryan Broadcasting must reimburse Henderson for the reasonable costs associated with modifying his construction permit to specify operation on Channel 297A.

the proposed upgrade at College Station for two reasons. First, the Caldwell upgrade proposal is defective because it does not comply with Section 73.315(a) of the Commission's Rules. *See Terrell and Daingerfield, Texas*, 5 FCC Rcd 556 (1990); *see also Clemson, South Carolina*, 2 FCC Rcd 3583 (1987); *Wadley and Dadeville, Alabama*, 60 RR 2d 1462 (1986). As such, we do not believe it to be in the public interest to prefer this proposal over a competing proposal in compliance with Commission Rules. Furthermore, we note that a Channel 236C2 upgrade at Caldwell will result in the removal of the Channel 236A allotment at Caldwell which complies with Section 73.315(a) of the Rules. In this vein, we see no public interest benefit in having the only broadcast station assigned to Caldwell not providing a requisite principal city service signal to its community of license.

9. In response to the *Order to Show Cause*, Henderson again argues the relative merits of his proposed upgrade at Caldwell versus the proposed upgrade at College Station. As discussed earlier, we are denying the proposed upgrade at Caldwell because it is defective. In addition, Henderson refers to the ownership interests of Bryan Broadcasting in Texas to support a conclusion that a College Station upgrade would have a "severe monopolistic impact" and perpetuate a "stranglehold of media coverage." In a separate context, Henderson refers to earlier efforts in MM Docket No. 88-48 to obtain upgrades at College Station and Caldwell. Pursuant to a settlement, Station KTSR in College Station was upgraded to Channel 297C3 instead of its originally requested Channel 235C2 upgrade.[15] In this connection, Henderson now contends that Bryan Broadcasting "abandoned" its earlier commitment to construct a Channel 297C3 facility in order to "block" his effort to upgrade on Channel 236C2. Neither of the latter two arguments provide any basis to prefer the defective Caldwell upgrade over the competing College Station upgrade.

10. In rejecting these two arguments, we first emphasize that the ownership interests of Bryan Broadcasting principals outlined by Henderson are in compliance with the Commission's multiple ownership rules.[16] In any event, a comparative rulemaking proceeding involves a technical and demographic analysis of the competing proposals in the context of Section 307(b) of the Act. Individual qualification issues are more properly considered in a licensing context. *See Revision of FM Assignment Policies and Procedures*, 56 RR 2d 448 (1984); *see also Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580 (1991); *FM Priorities, supra*. Similarly, we do not believe that the conduct or representations of either Bryan Broadcasting or Henderson in MM Docket No. 88-48 are relevant in this proceeding. Both parties sought upgrades in that proceeding. As part of a comprehensive settlement, Bryan Broadcasting agreed to an upgrade on Channel 297C3 instead of the Class C2 upgrade that it originally sought. The fact that Bryan Broadcasting is now seeking to upgrade to Class C2 facilities does not suggest an abandonment of its earlier commitment to upgrade on Channel 297C3. In the event that Bryan Broadcasting were unsuccessful in its efforts to obtain a Class C2 upgrade, it has stated its willingness to go forward with an upgrade on Channel 297C3. Finally, there is no reason to inquire as to the motives of Bryan Broadcasting in seeking an upgrade in this proceeding. In a comparative FM rulemaking proceeding, a proposal by one proponent necessarily "blocks" one or more competing proposals. It continues to be our view that such proceedings should be resolved on the basis of technical and demographic issues and the underlying motivation of any party is not relevant. *See Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama, supra*.

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and Section 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 21,1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

Community	Channel No.
College Station, Texas	236C2
Caldwell, Texas	297A

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Bryan Broadcasting , L.C. for Station KTSR, College Station, Texas, IS MODIFIED to specify operation on Channel 236C2 in lieu of Channel 297C3 subject to the following conditions:

(a) Within 90 days of the effective of this *Order*, the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

13. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Roy E. Henderson for Station KHEN, Caldwell, Texas, IS MODIFIED to specify operation on Channel 297A in lieu of Channel 236A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the authorization for Station KHEN except for the channel as specified above. Any other change, except those specified under Sec-

[15] In that proceeding, Henderson's proposal to upgrade Station KHEN to specify operation on Channel 236C2 was denied. 6 FCC Rcd 2050 (1991).

[16] In his response, Henderson identifies ownership interests in Harker Heights, Killeen, Hillsboro, Lubbock, Beaumont, Lufkin, Port Arthur, Victoria and Tyler, Texas. Henderson has not alleged that these interests contravene Section 73.3555 of the Rules, nor made any effort to support his conclusion that these interests will have a "monopolistic impact" or represent a "stranglehold of media coverage."

tion 73.1260 of h) the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301);

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the station's authorization except for the channel as specified above, and a license application (FCC Form 302) is within 10 days of commencement of program tests.

14. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following:

Roy E. Henderson

c/o Law Offices of Robert Buenzle

12110 Sunset Hills Road

Suite 450

Reston, Virginia 22090

15. IT IS FURTHER ORDERED, That the proposal by Roy E. Henderson for a Channel 236C2 upgrade for Station KHEN, Caldwell, Texas, IS DENIED.

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 776-1654.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

Ann Richards, Clayton Williams
Jim Mattox, Tom Luce, Kent
Hance, Robert Mosbacher, Jr.,
Tom Phillips, and Buster Brown

Against Station KLTV(TV),
Tyler, Texas

and

Station KTRE(TV),
Lufkin, Texas

ORDER

Adopted:June 29, 1995; Released: July 6, 1995

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed on January 21, 1993, on behalf of Ann Richards, Clayton Williams, Jim Mattox, Tom Luce, Kent Hance, Robert Mosbacher, Jr., Tom Phillips, and Buster Brown (hereinafter, collectively, "Complainants"). Complainants allege that commonly-owned television stations KLTV(TV), Tyler, Texas, and KTRE(TV), Lufkin, Texas,[1] overcharged them during the 1990 primary, primary runoff, and general elections in violation of the lowest unit charge requirements of Section 315(b) of the Communications Act of 1934, as amended.[2] Complainants also allege that KLTV and KTRE engaged in rate discrimination between candidates. Richards and Williams were legally qualified candidates for nomination and election for Governor of the State of Texas for the March 13, 1990, primary and November 6, 1990 general elections. Mattox, Luce, and Hance, were candidates for nomination for Governor of Texas in the March 13, 1990, primary election, and Mattox was also a candidate in the April 10, 1990, primary runoff election.[3] Mosbacher was a candidate for election for Lt. Governor of Texas in the November 6, 1990, general election. Brown was a candidate for election for Attorney General of the State of Texas in the November 6, 1990, general election. Phillips was a candidate for the Office of Chief Justice of the State of Texas. However, no information is submitted regarding the timing of Phillips' candidacy, the station charges to him, or whether his claims relate to the primary or general election, or both. The Bureau also has before it an Opposition to the complaint filed on March 8, 1993,[4] by TV-3, Inc. (hereinafter "TV-3"), licensee of stations KLTV and KTRE.

2. We have analyzed the complaint pursuant to the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991) (*"Declaratory Ruling"*), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Reconsideration Order"*). We find that none of the complainants established a *prima facie* case of a violation by stations KLTV and KTRE of the lowest unit charge ("LUC") requirement of Section 315(b)(1) of the Communications Act with respect to the period immediately preceding the March 13, 1990, primary election. Consequently, the complaints of Williams and Hance will be dismissed.[5] We find that Mattox has established a *prima facie* case of a lowest unit charge ("LUC") violation with respect to the period immediately preceding the April 10, 1990, primary runoff election. Further, we find that Richards, Brown, and Mosbacher have established a *prima facie* case of a violation by Station KLTV and KTRE of the LUC requirement of Section 315(b)(1) of the Communications Act with respect to the period immediately preceding the November 6, 1990, general election. Luce and Phillips failed to established a *prima facie* case of a LUC violation with respect to any election in 1990. Consequently, their complaints will be dismissed. None of the complainants established a *prima facie* case of rate discrimination between candidates. Accordingly, this claim is dismissed. Following is a discussion of the Bureau's findings with respect to all the issues raised, and a timetable and procedures for discovery, post-discovery, and election of a procedure for resolving that portion of this complaint presenting a *prima facie* case.[6]

3. As a procedural matter, TV-3 argues that "infirmities" exist in the complaint because it is not accompanied by declarations of the candidates. We did express in *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith (WTVT(TV))*, 7 FCC Rcd 6661 at n.6 (MMB 1992), *modified*, 7 FCC Rcd 7199 (MMB 1992), *review granted in part*

[1] KTRE is a satellite of KLTV licensed pursuant to an exception to the Commission's multiple ownership rules. 47 C.F.R. Section 73.3555, n.5.

[2] Section 315(b) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same time period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. Section 315(b).

[3] Richards was also a candidate in the 1990 primary runoff election. However, she makes no claim that she was overcharged for advertising on KLTV and KTRE with respect to either the primary or primary runoff elections.

[4] While the Opposition was originally due on January 29, 1993, Complainants' counsel consented to an extension of time until March 8, 1993. Accordingly, the Opposition was timely filed.

[5] Although Williams was a candidate in the 1990 general election, he makes no claim that he was overcharged by KLTV and KTRE during the LUC period preceding this election.

[6] Complainants request that the Commission address the issue of whether it has the authority to order rebates. Complainants also request that they be awarded interest and attorney's fees, and that the Commission impose sanctions upon KLTV and KTRE. We need not decide here whether the Commission has the authority to employ such remedies as we do not find, at this time, that any of these remedies are warranted in this case.

and denied in part, 8 FCC Rcd 131, 132 (1992) (*"WTVT"*), that it is our preference that candidates verify their complaints. In the absence of a specific rule or clear policy statement by the Commission, however, we will not dismiss a complaint on these grounds.

Prima Facie Analysis

4. This matter is properly before the Bureau pursuant to *Declaratory Ruling* , 6 FCC Rcd 7511 (1991). The Declaratory Ruling set forth specific procedural requirements governing Section 315(b) complaints. In order to invoke the Commission's enforcement procedures, complainants who allege a violation of Section 315(b) are required to make a *prima facie* showing of such violation. At a minimum, this showing must consist of a "short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." Declaratory Ruling , 6 FCC Rcd at 7513. A complainant must describe the specific factual basis for its belief that a station has committed a violation, rather than, for example, merely making a general allegation that a station has overcharged candidates. *WTVT*, 7 FCC Rcd at 6662-6663. The licensee may submit an answer to the complaint within ten days.

5. If, upon review of the complaint and answer (if filed), the Bureau determines that the complainant has established a prima facie case, the Bureau will issue an order giving the parties the opportunity to select one of two dispute procedures for resolving the complaint: mediation or disposition by the Bureau, subject to review by the Commission. *Declaratory Ruling*, 6 FCC Rcd at 7513. Under either procedure, the complainant is entitled to limited discovery, subject to specific conditions set forth in the Bureau's order. Declaratory Ruling, 6 FCC Rcd at 7513.[7]

OVERCHARGE ALLEGATIONS

Comparison With TV Factbook

6. Complainants allege that they were overcharged by KLTV and KTRE because they paid rates higher than those published in the 1990 and 1991 editions *Television and Cable Factbook* as the stations' "Highest 30 Sec. Rate." In its Opposition, TV-3 asserts that the figures listed in *Television and Cable Factbook* to which Complainants refer were considerably out of date and, in fact, had remained unchanged since 1985. KLTV's general sales manager submitted a statement asserting that, to the best of her knowledge, for several years the station did not respond to the publisher's annual request for an update of these figures. The sales manager further states that, according to *Television and Cable Factbook's* publisher, if there is no response from a station, the figures listed for the previous year are used in the following year's edition. TV-3 maintains that KLTV and KTRE's figures were adjusted in 1992. Complainants' only factual allegations concern a comparison of the rates charged to them with rates published in the 1990 and 1991 editions of *Television and Cable Factbook*. Thus, Complainants have not described a specific factual basis for their allegations.

Generally-available Statistical Data

7. The complaint also relies on generally-available industry or statistical data to show that KLTV and KTRE overcharged candidates. Specifically, Complainants cite average station-specific rates based on cost per point projections employing Spot Cost Outlook and Projections ("SCOOP"). In *Declaratory Ruling*, at n.47, the Commission specifically endorsed the use of generally-available industry or statistical data on average rates to make a *prima facie* case of an LUC violation. SCOOP and Spot Quotations and Data, Inc.("SQAD") are examples of such data. *See Dianne Feinstein, John Seymour, Thomas Hayes, et. al*, 9 FCC Rcd 1586 (MMB 1994) (*"KABC"*).[8]

8. As a preliminary matter, TV-3 argues in its Opposition that the SCOOP data submitted by Complainants cannot constitute a *prima facie* case of an LUC violation because the data does not distinguish between classes of time. However, in *WTVT* the Commission addressed the argument that industry or statistical data is not class specific. Therein, it stated that, "[e]ven if SQAD analyses do not take into account class of time, SQAD is a source of industry data on average rates, and as such is currently the best resource available for a candidate who does not have access to a station's commercial records to determine whether he or she has been overcharged." 8 FCC Rcd at 132 n.13. TV-3 further contests the validity of Complainants' SCOOP data on the basis that SCOOP rates are not station specific and that SCOOP rates fail to take into account the fact that KLTV in conjunction with KTRE is the "ratings leader" in the Tyler-Longview market. However, TV-3's argument is unpersuasive in light of the fact that we rejected similar arguments against SCOOP data in *WTVT*. 7 FCC Rcd at 6663. TV-3 also challenges the validity of complainants' SCOOP data on the basis that the ratings data chosen were for only one particular demographic group - adults 25-54. However, we find that Complainants' reliance on one particular demographic group not to be of decisional significance, in light of the fact that TV-3 has not shown that use of any other group would yield a different result. Further, TV-3 contends that it has rebutted whatever overcharge inferences may be drawn from Complainants SCOOP data with a detailed listing of candidate purchases indicating class, time periods, and rates. However, TV-3's assertion does not constitute a rebuttal to Complainants' SCOOP showing. For instance, TV-3 does not submit commercial invoices for the time periods in question to show that candidates were, in fact, charged the lowest unit rate for each class of time. Resolution of this issue will necessarily entail an examination of station records such as commercial invoices to which Complainants can gain access only through discovery.

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[7] We note that, in its Opposition, TV-3 states that it discovered some instances in which refunds were due to candidates, including Williams, who did not establish a *prima facie* case based on comparisons to average market rates. We do not find, however, that evidence of rebates alone is sufficient to establish a *prima facie* case of overcharges for Williams. We believe that while the issuance of rebates does not excuse a violation of our Rules, evidence of rebates is not in and of itself sufficient to make a *prima facie* case of an LUC violation. Were we to find that rebates alone establish a *prima facie* case of rule violation, we would be discouraging their issuance. *See* 47 C.F.R. Section 73.1942(a)(1)(ix); *see also*, FED. R. EVID. 410 (evidence of subsequent remedial measures is not admissible).

[8] In *KABC*, the Bureau relied on SCOOP data in determining that the complainants had made a *prima facie* case of an LUC violation.

9. Complainants submit SCOOP rates for various time periods during the first, second, and fourth quarters of 1990.[9] Complainants state that they compute second quarter 1990 SCOOP rates from cost-per-point data obtained from the first quarter 1990 *Media Market Guide* multiplied by Arbitron's May 1990 ratings. Complainants further state that they compute fourth quarter SCOOP rates by using cost-per-point information obtained from the third quarter 1990 *Media Market Guide* multiplied by Arbitron's November ratings. TV-3 contends that the factors used in complainants' SCOOP "computations are not fully disclosed . . . nor are the computations themselves presented to the Commission's review." However, we find the method employed by Complainants to determine the SCOOP rates for the second and fourth quarters of 1990 to be consistent with that which we have previously approved.[10] *See KABC*. Accordingly, we will accept SCOOP rate comparisons to candidate rates for these two quarters. It is unclear, however, how Complainants obtained the alleged SCOOP rates for the first quarter of 1990. While Complainants submit cost-per-point data obtained from the first quarter 1990 *Media Market Guide*, they indicate that this data is for computation of the second quarter SCOOP rates and, in fact, use second quarter ratings data in the computation. Accordingly, Complainants have provided us with no basis for their computation of their first quarter SCOOP rates, and we do not, therefore, accept SCOOP data comparisons to candidate rates with respect to the first quarter of 1990, the period preceding the March 13, 1990 primary election.

10. The complaint sets forth rates paid by Mattox during the LUC period preceding the April 10, 1990, primary runoff election. With regard to comparisons with the second quarter SCOOP rate, Mattox paid more than the SCOOP rate for KLTV and KTRE in eleven out of eleven time periods presented. Accordingly, Mattox has made a *prima facie* case of a violation of the Commission's LUC requirement for the period immediately preceding the 1990 primary runoff election. Based on this *prima facie* showing, we believe that further fact finding is warranted to determine whether Mattox was overcharged by KLTV and KTRE. The complaint also sets forth rates paid by Richards, Brown, and Mosbacher in the November 6, 1990, general election. Compared with the fourth quarter SCOOP rate, Richards, Brown, and Mosbacher paid more than the SCOOP rate for KLTV and KTRE in eleven out of eleven time periods presented. Accordingly, Richards, Brown, and Mosbacher have made a *prima facie* case of a violation of the Commission's LUC requirement for the period immediately preceding the 1990 general election. Based on this *prima facie* showing, we believe that further fact finding is warranted to determine whether Richards, Brown, and Mosbacher were overcharged by KLTV and KTRE. Since we are not considering SCOOP data for the first quarter of 1990, during which time the March 13, 1990, primary took place, no Complainants have established a *prima facie* case of an LUC violation with respect to this election. Consequently, the complaints of Williams and Hance will be dismissed. Further, because no candidate rates were provided for comparison with SCOOP rates by Luce and Phillips, their complaints will be dismissed.

ALLEGED RATE DISCRIMINATION

11. The complaint alleges that KLTV and KTRE discriminated in the advertising rates which it charged different candidates, in violation of Section 73.1941(e) of the Commission's Rules. 47 C.F.R. Section 73.1941(e). The complainant cites several examples in which different rates were charged to various Complainants for advertising during the same day parts. However, the complaint does not indicate the class of the spots. In its Opposition, TV-3 states that the difference in rates between the candidates is attributable to differences in the class of the spots and whether the spots were purchased to air on one station individually or both in combination. Clearly, if the spots were of a different class or if some were sold in combination rate, distinctions do not amount to discrimination. Complainants have neither provided information indicating whether the spots were sold individually or in combination for both stations, nor indicated the class of the spots at issue. Complainants have, therefore, failed to establish a *prima facie* case with respect to rate discrimination.

Timetable and Procedures for Discovery

12. In the *Declaratory Ruling*, the Commission determined that, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery, subject to specific conditions established by the Bureau. *See Declaratory Ruling*, 6 FCC Rcd at 7513-14, 7521, n.49. *See also, WTVT*, 7 FCC Rcd at 6665. Accordingly, we will allow Mattox limited discovery on the issue of overcharges during the forty-five days preceding the April 10, 1990, primary runoff election. We will allow Richards, Brown, and Mosbacher limited discovery on the issue of overcharges during the sixty days preceding the November 6, 1990, general election. The documents set forth in Appendix A to this *Order*, and answers to the written interrogatories set forth in Appendix B to this *Order*, must be served upon counsel for Mattox, Richards, Brown, and Mosbacher (not the Commission) by KLTV and KTRE on or before the first day of the discovery period, which will be thirty days after the release date of this *Order*. *See* Appendix C.

13. Any request for further discovery by Mattox, Richards, Brown, and Mosbacher must contain a showing that such discovery is necessary to resolve the issue of overcharges.[11] Any discovery request by KLTV and KTRE for production of documents, answers to written interrogatories, or for the taking of depositions must dem-

[9] The SCOOP rates submitted by complainants was for advertising on both KLTV and KTRE in combination. We assume that the candidate rates submitted for comparison are also combination rates. A review of TV-3's detailed listing of candidate purchases appears to support our assumption.

[10] Although we would prefer all of complainants' methodology to be revealed, because they provide the cost-per-point source and relevant quarter, as well as the ratings source and month employed in their calculations, it is certainly possible to verify the methodology employed from the information presented.

[11] On December 20, 1994, complainants filed a request for expanded discovery seeking interrogatories and documents relating to station practices regarding preemption of commercial announcements. On January 12, 1995, TV-3 filed an opposition to complainants' request. Because complainants' request extends beyond the scope of this proceeding, it is being handled separately. Consequently, we will not address this issue here.

onstrate that the information requested is necessary for KLTV and KTRE to respond to arguments or claims that could be made by Mattox, Richards, Brown, and Mosbacher in their amended complaint. We emphasize that any request for depositions must also demonstrate that depositions are necessary to resolution of the issue of overcharges and include a list of the proposed deponents.[12] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible.

14. Documents produced by KLTV and KTRE that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, the name(s) of any person employed by the advertiser, and the name of any media company or agency representing the commercial advertisers and any persons employed by such media company or agency. Where any such information is redacted, KLTV and KTRE shall advise Mattox, Richards, Brown, and Mosbacher of the type of information deleted. Further redactions will be allowed only if the information redacted is proprietary and not relevant to resolution of the complaint. Should Mattox, Richards, Brown, and Mosbacher serve documents upon KLTV and KTRE they may redact proprietary information and so advise KLTV and KTRE of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact. As with all discovery matters, the parties should make good faith attempts to resolve any discovery disputes before presenting such a dispute to the Bureau.

15. Any documents, answers to written interrogatories, or deposition transcripts, if any, produced during discovery, and the information revealed thereby, shall not be provided to any third party other than the Commission. Copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp.

16. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to Mattox, Richards, Brown, and Mosbacher the management of KLTV and KTRE, their attorneys and staffs, and expert witnesses. Either party may require the other to disclose in writing the names of staff and experts who have access to documents and written information. Each party must explain to all staff and experts that the documents, answers to written interrogatories, deposition transcripts, and their contents may not be disclosed to any entity other than the Commission.

17. None of the materials produced, nor the contents thereof, may be used for any purpose other than the prosecution of the instant complaint. Each individual who is provided access to these materials is hereby required to certify in writing that he or she has personally reviewed this order and understands the limitations imposed on the signing party. No copies of materials protected by this order may be made except copies to be used by the persons identified in paragraph 17. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided. Upon termination of this proceeding, including any appeals, petitions or settlement, all originals and reproductions of any protected materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the protected materials of an opposing party shall be destroyed.

18. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may warrant. Such agreement should be confirmed in writing and a copy provided to the Bureau. As noted in the *Declaratory Ruling*, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the complaint or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. Section 1.24.

19. Extensions of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or both parties submit declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

20. Within thirty days after completion of discovery, Mattox, Richards, Brown, and Mosbacher must file an amended complaint, alleging specific facts based on the information discovered, stating the nature of the Section 315(b)(1) violation and the amounts said to be owed. After KLTV and KTRE have filed their answer, the parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution.

21. Settlement of lowest unit charge claims is strongly encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. *See Declaratory Ruling*, 6 FCC Rcd at 7521, n.52.

22. ACCORDINGLY, we find that a *prima facie* case of a violation of the Commission's lowest unit charge requirement has been established by Mattox in connection with advertising aired on KLTV and KTRE on his behalf during the forty-five days before the April 10, 1990, primary runoff election. We also find that a *prima facie* case of a violation of the Commission's lowest unit charge requirement has been established by Richards, Brown, and

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[12] *See WTVT*, 8 FCC Rcd 714, 717 (MMB 1993)(Further Discovery Order). In this regard, we require the party seeking depositions to demonstrate with respect to *each* witness they seek to depose, that the individual's testimony is necessary to the resolution of the issues upon which discovery has been granted herein. This must include "*specific*" arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence." *Id.*

Mosbacher in connection with advertising aired on KLTV and KTRE on their behalf during the sixty days preceding the November 6, 1990, general election. The parties are hereby ORDERED to follow the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established herein.

23. We find that Williams, Mattox, and Hance have failed to make a *prima facie* case of a violation of the lowest unit charge requirement with regard to the forty-five day period preceding the March 13, 1990 primary election. Accordingly, the claim of Mattox is DISMISSED as to that time period and the complaints of Williams and Hance are DISMISSED altogether. Moreover, we find that a *prima facie* case with respect to a violation of the lowest unit charge requirement has not been made by Luce and Phillips with respect to any election. Therefore, their complaints against KLTV and KTRE are DISMISSED. In addition, we find that Complainants failed to establish a *prima facie* case with respect to allegations that KLTV and KTRE discriminated between candidates in advertising rates charged. Thus, those claims are DISMISSED as to all complainants.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANTS MATTOX, RICHARDS, BROWN, AND MOSBACHER

Certain documents shall be produced to Mattox, Richards, Brown, and Mosbacher by KLTV and KTRE by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060 in accordance with the procedures outlined in this Order.[13] The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of candidates for public office in connection with the April 10, 1990 and primary runoff and November 6, 1990 general elections.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the April 10, 1990, primary runoff and November 6, 1990 general elections.

3) Copies of invoices and contracts for, and program logs related to: all commercial time run on KLTV and KTRE beginning on February 24, 1990, and running through April 9, 1990 (the forty-five days preceding the relevant primary runoff election); all commercial time run on KLTV and KTRE beginning on September 7, 1990 and running through November 5, 1990 (the sixty days preceding the relevant general election).

This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired, and, if not apparent from the preceding, documents reflecting all agency discounts provided by the station;

b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during this period;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order;

d) All orders for commercial spots aired during this period, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during this period; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during this period.

4. All documents used by KLTV and KTRE to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of Section 315(b) of the Communications Act. This should include any written policy statement(s) used by KLTV and KTRE during the 1990 primary runoff and/or general elections which directly or indirectly related to KLTV and KTRE pricing policies.

5. All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of KLTV and KTRE with respect to the 1990 primary runoff and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by KLTV and KTRE in performing any such audit or providing any such rebates.

[13] We emphasize that pursuant to this Order discovery for Mattox shall only be for the forty-five days preceding the April 10, 1990, primary runoff election and discovery for Richards, Brown, and Mosbacher shall be limited to the sixty days preceding the November 6, 1990, general election.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS MATTOX, RICHARDS, BROWN, AND MOSBACHER

Answers to the following interrogatories shall be provided to Mattox, Richards, Brown, and Mosbacher in accordance with the procedures set forth in this *Order:*

1) Describe how KLTV and KTRE arrived at its lowest unit charge ("LUC") for the 1990 primary runoff and general elections.

2) Detail any actions taken by KLTV and KTRE to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1990 statutory LUC periods applicable to this *Order.* This should include the identities of all individuals taking or participating in such action, identifying their position at KLTV and KTRE and should identify all documents which refer to or formed a part of KLTV's and KTRE's efforts to ensure that candidates received the LUC.

3) Provide a statement that indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time period.

4) Provide a statement that explains any codes used by KLTV and KTRE or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period (thirty days after release of this *Order):* Day 1

Documents in Appendix A and Answers to Written Interrogatories in Appendix B due: Day 1

Request by complainants Mattox, Richards, Brown, and Mosbacher for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due: Day 15

Opposition by KLTV and KTRE to complainant's Mattox, Richards, Brown, and Mosbacher request for further discovery due: Day 20

KLTV and KTRE's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due: Day 20

Opposition by complainants Mattox, Richard, Brown, and Mosbacher to KLTV and KTRE's request for discovery due: Day 27

Documents and answers to written interrogatories (if allowed by Bureau) pursuant to KLTV and KTRE's request for discovery due: Day 45

Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to complainants Mattox, Richards, Brown, and Mosbacher's request for further discovery due: Day 60

Final day of discovery period: Day 60

Complainants Mattox, Richards, Brown, and Mosbacher's amended complaint due: Day 90

KLTV and KTRE's answer to amended complaint due: Day 105

Joint notice of election of complaint resolution procedure due: Day 116

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

LAWTON CHILES, BOB MARTINEZ,
BILL NELSON, and JIM SMITH

Against Gainesville TV, Inc.,
Licensee of Station WCJB(TV),
Gainesville, Florida

ORDER

Adopted: June 27, 1995; Released: July 6, 1995

By: Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a Complaint filed April 7, 1993, on behalf of Lawton Chiles, Bob Martinez, Bill Nelson and Jim Smith (collectively "Complainants") against Gainesville TV, Inc., licensee of Station WCJB(TV), Gainesville, Florida ("WCJB"). The Bureau also has before it an answer to the complaint filed by WCJB on May 14, 1993.[1]

2. Complainants allege that WCJB(TV) overcharged them during the period preceding the September 4, 1990, primary election, and the November 4, 1990, general election in violation of the "lowest unit charge" ("LUC") requirements of § 315(b) of the Communications Act of 1934, as amended.[2] Complainants also allege violations of the non-discrimination provisions in § 73.1941(e) of the Commission's Rules during the same election periods. Chiles, Martinez, and Nelson were all candidates for the Gubernatorial nomination in Florida during the primary election. Chiles and Martinez were also candidates for Governor during the 1990 general election. Smith was a candidate for the Florida Secretary of State during both the primary and general elections.

3. For the reasons set forth below, it is concluded that Complainants Martinez and Nelson have established a *prima facie* case of a violation by WCJB(TV) of the LUC provision during the 1990 primary election. It is also concluded that Complainant Martinez has established a *prima facie* case of a violation by WCJB(TV) of the LUC provision during the 1990 general election. Complainants Chiles and Smith, however, have failed to establish a *prima facie* case of an LUC violation, and therefore their complaint in connection with the LUC provision against WCJB(TV), is dismissed. In addition, Complainants have failed to establish a *prima facie* case of discrimination between candidates, and thus these claims are dismissed. Following is a detailed discussion of the Bureau's specific findings with respect to the issues raised, and the timetable and procedures for discovery, post-discovery, and election of a procedure for resolving this complaint.

Prima Facie Analysis

4. This matter is properly before the Bureau pursuant to *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) ("*Declaratory Ruling*"). The *Declaratory Ruling* set forth specific procedural requirements governing § 315(b) complaints.

5. In order to invoke the Commission's enforcement procedures, complainants who allege a violation of § 315(b) are required to make a *prima facie* showing of such violation. At a minimum, this showing must consist of a "short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 22. A complainant must describe the specific factual basis for its belief that a station has committed a violation, rather than, for example, merely making a general allegation that a station has overcharged candidates. *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661, 6662-6663 (MMB), *modified*, 7 FCC Rcd 7199 (MMB), *rev. granted in part and denied in part*, 8 FCC Rcd 131, 132 (1992) ("*WTVT*"). The licensee may submit an answer to the complaint within ten days.

6. If, upon review of the complaint and answer (if filed), the Bureau determines that the complainant has established a *prima facie* case, the Bureau will issue an order giving the parties the opportunity to select one of two dispute procedures for resolving the complaint: mediation or disposition by the Bureau, subject to review by the Commission. *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 22. Under either procedure, the complainant is entitled to limited discovery, subject to specific conditions set forth in the Bureau's order. *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 23.

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[1] WCJB was granted an extension of time to file its answer.

[2] Section 315(b) provides as follows:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
>
> (2) at any other time, the charges made for comparable use of such station by other users thereof.
>
> 47 U.S.C. Section 315(b).

Lowest Unit Charge Allegations

7. Complainants allege that WCJB(TV) violated the LUC requirements by charging rates for political advertisements which exceeded "SCOOP"-based rates. SCOOP, the acronym for *Spot Cost Outlook and Projections*, a product of *Media Market Guide*, is a compilation of generally available statistical data on average rates charged by television stations. In support, Complainants state that they multiplied the average SCOOP rate for a given daypart in the Gainesville, Florida, market, as contained in the *Media Market Guide*, by the Arbitron ratings for WCJB(TV), as listed in Arbitron's *Television Market Report*. Specifically, to arrive at SCOOP-based rates for the third quarter, they multiplied the SCOOP rates contained in the third quarter 1990 *Media Market Guide* by the third quarter ratings data listed in Arbitron's July 1990 *Television Market Report*. For the fourth quarter, Complainants multiplied the SCOOP rates in the fourth quarter *Media Market Guide* by the November Arbitron ratings listed in *Television Market Report*. The demographic used in all of Complainants' calculations was households. Complainants then compared the station-specific SCOOP-based rates with the rates actually charged to two of the Complainants, Nelson and Martinez, during the third quarter.[3] Complainants compared only Martinez's rates with SCOOP-based rates during the fourth quarter.[4]

8. In its answer, WCJB argues that SCOOP-based rate comparisons are inherently flawed because they do not take into consideration the class of time purchased by the candidate, the day of the week, or the particular program broadcast. WCJB also contends that analyses based upon general market rate information, such as SCOOP, are unreliable since they do not take into account the various classes of time, but rather are an estimate of the average cost-per-point, irrespective of class. WCJB argues that its status as the dominant television station in the Gainesville market further skews the reliability of Complainant's showing as a consequence of its superior bargaining position in the Gainesville market. Finally, WCJB claims that its comparison of the rates charged Complainants with the actual rates charged commercial advertisers for the same classes, lengths, and time periods, demonstrates that in every instance of alleged overcharge the candidates were charged the appropriate LUC.

9. A complainant may make a *prima facie* case by using generally-available industry or statistical data on average rates to show that the rate paid by a candidate was higher than the average rate charged by the station. *Declaratory Ruling*, 6 FCC Rcd at 7521, n.47. In this vein, we have recognized SCOOP-based rates as a valid source of statistical information to support a *prima facie* case of overcharging. *See e.g. Diane Feinstein, John Seymour, Thomas Hayes* ("KABC"), 9 FCC Rcd 1586, 1587 (1994). Moreover, in *WTVT*, 8 FCC Rcd at 132, n.13, the Commission determined that even when such generally available information does not take specific classes of time into consideration, it remains the best source of pertinent data for candidates unable to gain access to a station's commercial sales records in order to ascertain whether any overcharges have occurred. We note that despite WCJB's claim that its analysis of station "contracts" for both commercial and political advertisers reveals that no LUC violations occurred, none of the contract materials are provided in support. We also note that WCJB failed to refute the validity of either the particular SCOOP rates or the Arbitron rates relied upon by Complainants. Finally, with respect to WCJB's argument that SCOOP-based rates are not specific to WCJB(TV), we refer to Complainant's showing of Arbitron ratings which are specific to the station for the relevant time periods. *WTVT*, 8 FCC Rcd at 132.

10. For all the foregoing reasons, we find that Complainants have established a *prima facie* case of a violation of the LUC requirements by demonstrating that the rates paid by Martinez and Nelson for use of WCJB(TV)'s facilities during the 1990 primary election period appear to be higher than the average station-specific SCOOP-based rates for the third quarter of 1990. We also find that Complainants have established a *prima facie* case of a violation of the LUC requirements by demonstrating that the rates paid by Martinez for use of WCJB(TV)'s facilities during the 1990 general election period appear to be higher than the average station-specific SCOOP-based rates for the fourth quarter of 1990.

11. In addition, the claims concerning Chiles and Smith must be dismissed in their entirety. The only material furnished by Complainants to support their allegation regarding Chiles is a document with the caption "Estimate" at the top. There is no indication on this document of what rates Chiles actually paid, or for what time periods. Nor did Complainants include any Chiles spots on its SCOOP-to-candidate comparison chart. Thus, it is impossible to determine whether Chiles was overcharged by comparison to the SCOOP rates. Similarly, there is no supporting documentation with respect to Smith.

12. Complainants allege that, on several occasions, WCJB charged Chiles and Martinez more than the highest rate ($1200.00) for a 30-second spot on WCTV(TV), as specified in the 1990 edition of *Television and Cable Factbook*. In light of our finding of a *prima facie* case with respect to Martinez, it is unnecessary to resolve this allegation as to his claim. However, Complainants were unable to establish a SCOOP-based *prima facie* case concerning Chiles, thus neccesitating resolution of this allegation as to him. We reject this claim on Chiles' behalf because Complainants do not reveal how *Television and Cable Factbook* compiles

[3]

	Arbitron Rating	SCOOP CPP Est	SCOOP	Nelson	Martinez
6-7a	4	9.47	37.88		80
7-9a	11	9.47	104.17	100	120
12-12:30p	12	9.17	110.04	150	200
12:30-4p	12	9.17	110.04		150
6-6:30p	25	20.46	511.50	725	725
7-7:30p	14	14.80	207.20		400
7:30-8p	13	14.80	192.40		400
11-11:30p	15	21.06	315.90	425	425

[4]

	Rating	SCOOP CPP Est	SCOOP	Martinez
6-7a	4	9.67	39	50
7-9a	11	9.67	106	130
12-12:30p	9	11.42	103	200
12:30-4p	9	11.42	103	175
4-5p	11	13.83	152	175
6-6:30p	29	23.54	683	750
7-7:30	16	14.47	232	325
7:30-8p	16	14.47	232	325
11-11:30p	14	27.70	388	450

information about station rates, and WCJB states that the $1200.00 rate listed in the *Television and Cable Factbook* is a suggested rate, not representative of the actual rates at WCJB(TV).[5] Accordingly, Complainants' attempt to use the information in *Television and Cable Factbook* as a barometer for measuring WCJB's compliance with the Commission's LUC requirements is rejected.

13. Complainants next allege that WCJB violated the Commission's LUC requirements during the 1990 primary and general election periods in connection with its sale of time to the Florida Lottery at rates lower than those paid by Martinez for comparable time periods. No specific showing is provided with respect to any other candidate. In light of our finding above, that a *prima facie* case of overcharging has been established by Martinez, it is unnecessary to resolve this claim.[6]

Discrimination Allegations

14. The Bureau also concludes that Complainants have failed to establish a *prima facie* case of rate discrimination by WCJB(TV). The non-discrimination provisions of § 73.1941(e) of the Commission's Rules [formerly § 73.1940(c)], which implements the equal opportunites provision of § 315(a) of the Communications Act "are predicated on the philosophy that competing legally qualified candidates are entitled to equal treatment in the availability of political advertising and other broadcast time not exempt as bona fide news programming." *Independent Democrats for LaRouche*, 57 RR 2d 98, 102 (1984). In order to be treated as discriminatory political sales as envisioned by § 73.1941(e), the difference in the rates charged candidates must be for comparable time periods, lengths of time, and class of time. Complainants have made no representations with respect to the class of any of the time purchased by the candidates shown in their comparison.[7] Nor is it possible for the Commission to independently ascertain the class of time for each spot since the invoices provided by Complainants in support of this allegation do not indicate what class of time is involved for any alleged instance of discrimination. Moreover, WCJB's answer states categorically that each example of disparate rates cited by Complainants involved different classes of time. Consequently, it is concluded that Complainants have failed to establish a *prima facie* case, and the Complaint, to the extent it alleges rate discrimination by WCJB(TV), is dismissed.

Timely Rebates

15. Complainants allege that complainant Chiles was overcharged because WCJB(TV) rebated $290.00 to Chiles nineteen months after their first correspondence with the station and approximately two years after the alleged overcharges were made. We note that the licensee states that it discovered some instances in which refunds were due to Chiles and rebated monies accordingly. We do not find, however, that evidence of rebates alone is sufficient to establish a *prima facie* case of overcharges for Chiles. We believe that while the issuance of rebates does not excuse a violation of our Rules, evidence of rebates is not in and of itself sufficient to make a *prima facie* case of an LUC violation. Were we to find that rebates alone establish a *prima facie* case of rule violation, we would be discouraging their issuance. See 47 C.F.R. Section 73.1942(a)(1)(ix); *see also*, FED. R. EVID. 410 (evidence of subsequent remedial measures is not admissible).

16. Furthermore, licensees have long been required to make rebates to political candidates who paid more for advertising than a commercial advertiser for the same class and length of spot during the same time period.[8] However, it was not until the codification of the Commission's political programming policies in 1991, that we specifically stated that all rebates had to be made in a timely fashion. *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 694 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992)("[w]e will henceforth require that stations review their program logs periodically during the election

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[5] Furthermore, Complainants' failure again to furnish any supporting materials to show what rates Chiles actually paid, or for what specific time periods, further negates this allegation.

[6] WCJB contends that the disparity in rates is due entirely to the fact that Martinez chose to purchase only the premium-priced non-preemptible class of time and the Florida Lottery purchased the less costly preemptible class. While Complainants do not dispute WCJB's claim that different classes were involved, they suggest that none of the Florida Lottery spots were preempted, thus making them the functional equivalent of non-preemptible time. As such, complainants urge the Commission to compare the non-preemptible and preemptible rates for LUC purposes. In an affidavit of Carolyn Catlin, Vice President and General Manager of WCJB, however, she declares that, in fact, two Florida Lottery spots were preempted during the period between August 10, 1990 and October 26, 1990. The affidavit gives the specific time of day of each preemption and identifies the contract number. This assertion appears to directly refute Complainants' allegation.

Furthermore, even if no preemptions of Florida Lottery spots had occurred, it would still be necessary to show a sufficient pattern of not preempting preemptible time to establish that a particular preemptible class of time was the functional equivalent of a non-preemptible class. Preemptible classes of time have associated risks of preemption, and it is that risk that characterizes the spot, not whether the spot actually clears. In the absence of any further showing to support Complainants' suggestion that WCJB(TV) provided the Florida Lottery with an assurance against preemption at preemptible rates, we do not find that Complainants have established a *prima facie* case of overcharging with respect to this allegation.

[7] Complainants provided the following comparisons:

Nelson	8/20	7-9a	100
Martinez	8/20	7-9a	240 (60)
Nelson	8/23	7-9a	100
Martinez	8/23	7-9a	120
Nelson	8/23	5-5:30p	125
Martinez	8/23	5-5:30p	140
Nelson	8/24	5:30-6p	130
Martinez	8/24	5:30-6p	160
Nelson	8/24	6-7a	60
Martinez	8/24	6-7a	80
Martinez	10/18	7-9a	130
Chiles	10/12-18	7-9a	80
Martinez	10/18	12-12:30p	200
Chiles	10/12-18	12-12:30p	100
Martinez	10/17	6-6:30p	750
Chiles	10/12-18	6-7p	550
Martinez	10/17	11-11:30p	450
Chiles	10/12-18	11-11:30p	350

[8] *See Public Notice, Licensees and Cable Operators Reminded of Lowest Unit Charge Obligations*, 4 FCC Rcd 3823, 3824 (1988).

period to determine whether rebates are required, and issue any such rebates or credits promptly.") Since this complaint concerns 1990 LUC periods, and we did not specify the necessity of making timely rebates until 1991, we cannot find the station culpable for violation of a rule which did not exist at the time of its alleged violation, and no further action is warranted.[9]

Timetable and Procedures for Discovery

17. In the *Declaratory Ruling*, the Commission determined that, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery, subject to specific conditions established by the Bureau. *See Declaratory Ruling* at 7513-14, 7521, n.49. *See also, WTVT*, 7 FCC Rcd at 6665. Accordingly, we will allow Complainants Martinez and Nelson limited discovery on the issue of overcharges during the 45 days before the September 4, 1990, primary, and we will allow Complainant Martinez limited discovery for the period 60 days before the November 6, 1990, general election. The documents set forth in Appendix A to this *Order*, and answers to the written interrogatories set forth in Appendix B to this *Order*, must be served upon counsel for Complainants Martinez and Nelson (not the Commission) by WCJB on or before the first day of the discovery period, which will be 30 days after the release date of this *Order*. *See* Appendix C.

18. Any request for further discovery by Complainants Martinez and Nelson must contain a showing that such discovery is necessary to resolve the issue of overcharges. Any discovery request by WCJB for production of documents, answers to written interrogatories, or for the taking of depositions must demonstrate that the information requested is necessary for WCJB to respond to arguments or claims that could be made by Complainants Martinez and Nelson in their amended complaint. We emphasize that any request for depositions must also demonstrate that depositions are necessary to resolution of the issue of overcharges and include a list of the proposed deponents.[10] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible.

19. Documents produced by WCJB that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, the name(s) of any person employed by the advertiser, and the name of any media company or agency representing the commercial advertisers and any persons employed by such media company or agency. Where any such information is redacted, WCJB shall advise Complainants Martinez and Nelson of the type of information deleted. Further redactions will be allowed only if the information redacted is proprietary and not relevant to resolution of the complaint. Should Complainants Martinez and Nelson serve documents upon WCJB they may redact proprietary information and so advise WCJB of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact. As with all discovery matters, the parties should make good faith attempts to resolve any discovery disputes before presenting such a dispute to the Bureau.

20. Any documents, answers to written interrogatories, or deposition transcripts, if any, produced during discovery, and the information revealed thereby, shall not be provided to any third party other than the Commission. Copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp.

21. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to Complainants Martinez and Nelson, the management of WCJB, their attorneys and staffs, and expert witnesses. Either party may require the other to disclose in writing the names of staff and experts who have access to documents and written information. Each party must explain to all staff and experts that the documents, answers to written interrogatories, deposition transcripts, and their contents may not be disclosed to any entity other than the Commission.

22. None of the materials produced, nor the contents thereof, may be used for any purpose other than the prosecution of the instant complaint. Each individual who is provided access to these materials is hereby required to certify in writing that he or she has personally reviewed this order and understands the limitations imposed on the signing party. No copies of materials protected by this *Order* may be made except copies to be used by the persons identified in paragraph 20. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided. Upon termination of this proceeding, including any appeals, petitions or settlement, all originals and reproductions of any protected materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the protected materials of an opposing party shall be destroyed.

23. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may warrant. Such agreement should be confirmed in writing and a copy provided to the Bureau. As noted in the *Declaratory Ruling*, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the complaint or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. § 1.24.

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[9] To the extent that any other rebates occurred, the same rationale would apply.

[10] *See Lawton Chiles, Bob Martinez, and Bill Nelson*, 8 FCC Rcd 714, 717 (MMB 1993). In this regard, we require the party seeking depositions to demonstrate with respect to *each* witness they seek to depose, that the individual's testimony is necessary to the resolution of the issues upon which discovery has been granted herein. This must include "*specific*" arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence." *Id.*

24. Extensions of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or both parties submith) declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

25. Within 30 days after completion of discovery, Complainants Martinez and Nelson must file an amended complaint, alleging specific facts based on the information discovered, stating the nature of the § 315(b)(1) violation and the amounts said to be owed. After WCJB has filed its answer, the parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution.

26. Settlement of lowest unit charge claims is strongly encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. *See Declaratory Ruling*, at 7521, n. 52.

27. ACCORDINGLY, we find that a *prima facie* case of a violation of the Commission's lowest unit charge requirement has been established by Complainants Martinez and Nelson in connection with advertising aired on WCJB on their behalf during the 45 days before the September 4, 1990, primary. We also find that a *prima facie* case of a violation of the Commission's lowest unit charge requirement has been established by Complainant Martinez in connection with advertising aired on WCJB on his behalf during the 60 days preceding the November 6, 1990, general election. The parties are hereby ORDERED to follow the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established herein.

28. We find that Complainants Chiles and Smith have failed to make a *prima facie* case of a violation of the LUC requirement. Thus, their claims are dismissed in their entirety. In addition, we find that Complainants failed to establish a *prima facie* case with respect to allegations that WCJB discriminated between candidates in advertising rates charged. Thus, the discrimination claims are DISMISSED as to all complainants.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANTS MARTINEZ AND NELSON

Certain documents shall be produced by WCJB to Complainants Martinez and Nelson by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060 in accordance with the procedures outlined in this Order. The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of candidates for public office in connection with the 1990 primary and general elections.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the 1990 primary and general elections.

3) Copies of invoices and contracts for, and program logs related to: all commercial time run on WCJB beginning on July 21, 1990 and running through September 3, 1990, (the 45 days preceding the relevant primary election); and all commercial time run on WCJB beginning on September 7, 1990 and running through November 5, 1990 (the 60 days preceding the relevant general election).

This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired, and, if not apparent from the preceding, documents reflecting all agency discounts provided by the station;

b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during this period;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order;

d) All orders for commercial spots aired during this period, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during this period; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during this period.

4) All documents used by WCJB to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of Section 315(b) of the Communications Act. This should include

any written policy statement(s) used by WCJB in 1990 which directly or indirectly related to WCJB's pricing policies.

5) All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of WCJB with respect to the 1990 primary and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by WCJB in performing any such audit or providing any such rebates.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS MARTINEZ AND NELSON

Answers to the following interrogatories shall be provided to Complainants Martinez and Nelson in accordance with the procedures set forth in this *Order:*

1) Describe how WCJB arrived at its LUC in 1990.

2) Detail any actions taken by WCJB to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1990 statutory LUC periods. This should include the identities of all individuals taking or participating in such action, identifying their position at WCJB, and should identify all documents which refer to or formed a part of WCJB's efforts to ensure that candidates received the LUC.

3) Provide a statement that indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time period.

4) Provide a statement that explains any codes used by WCJB or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period (30 days after release of this *Order):* Day 1

Documents in Appendix A and Answers to Written Interrogatories in Appendix B due: Day 1

Request by Complainants Martinez and Nelson for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due: Day 15

Opposition by WCJB to Complainants Martinez and Nelson's request for further discovery due: Day 20

WCJB's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due: Day 20

Opposition by Complainants Martinez and Nelson to WCJB's request for discovery due: Day 27

Documents and answers to written interrogatories (if allowed by Bureau) pursuant to WCJB's request for discovery due: Day 45

Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to Complainants Martinez and Nelson's request for further discovery due: Day 60

Final day of discovery period: Day 60

Complainants Martinez and Nelson's amended complaint due: Day 90

WCJB's answer to amended complaint due: Day 105

Joint notice of election of complaint resolution procedure due: Day 116

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Associated Communications & Research Services, Inc.'s — AAD 90-16

Request to Classify Certain Services as Enhanced Services Under Section 64.702(a) of the Commission's Rules.

ORDER

Adopted: June 29, 1995; Released: July 6, 1995

By the Chief, Accounting and Audits Division:

1. On June 22, 1995, Associated Communications & Research Services, Inc. (ACRS) filed a request for voluntary dismissal of its request for classification of certain services as enhanced services under Section 64.702(a) of the Commission's rules.[1]

2. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that Associated Communications & Research Services, Inc.'s request for dismissal IS GRANTED, without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

[1] 47 C.F.R. § 64.702(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

ZELL MILLER, ROY BARNES,
JOHNNY ISAKSON, ANDREW YOUNG

Against Station WVGA-TV
Valdosta, Georgia

ORDER

Adopted: June 29, 1995; Released: July 6, 1995

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint dated July 29, 1992, on behalf of Zell Miller, Roy Barnes, Johnny Isakson, and Andrew Young ("Complainants") alleging that television station WVGA-TV, Valdosta, Georgia, overcharged them for public use of the station during the 1990 primary, runoff and general elections, in violation of the lowest unit charge ("LUC") requirements of Section 315(b) of the Communications Act of 1934, as amended.[1] Complainants also contend that, during the 1990 elections, WVGA engaged in rate discrimination in violation of Section 73.1941(e) of the Commission's Rules.[2] In 1990, the Complainants were all legally qualified candidates for the office of Governor of the State of Georgia. Each ran in the July 17, 1990, primary election. Miller and Young ran in the August 7, 1990, runoff election and Isakson and Miller ran in the November 6, 1990, general election. On August 6, 1993, WVGA-TV filed a response to the Complaint.

2. We have reviewed the allegations pursuant to the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*), and *Lawton Chiles, Bob Martinez, Bill Nelson and Jim Smith* (*"WTVT"*), 7 FCC Rcd 6661, 6662-63 (MMB 1992), *modified*, 7 FCC Rcd 7199 (MMB 1992), *review granted in part and denied in part*, 8 FCC Rcd 131, 132 (1992). In light of the information before us, we find that Complainants have not established a *prima facie* case of violations by WVGA-TV of the LUC requirements of Section 315(b)(1) of the Communications Act of 1934, as amended, during the 1990 primary, runoff and general elections. Timeliness of Complaint

3. In its response, WVGA-TV argues that the complaint should be dismissed because it was not timely filed. According to WVGA-TV, pursuant to Section 1.80(c)(1) of the Commission's Rules, a complaint can be barred if not filed within one year of the matter complained of. Moreover, the fact that stations are required to keep political records for only two years, WVGA-TV contends, establishes at least a two year statute of limitations on claims. Here, WVGA-TV was first contacted on behalf of the Complainants by letter dated March 20, 1991. The station responded on April 3, 1991, and heard nothing further until it received a demand for settlement from Complainants' counsel on April 13, 1992. As noted, the instant Complaint was dated July 29, 1992. WVGA-TV then went off the air in November 1992. Prior to that time, the station was operated pursuant to a local marketing agreement with WXTL-TV, Tallahassee, Florida.

4. We will not dismiss the Complaint on the ground that it is untimely. Section 1.80(c)(1) of the Commission's Rules prescribes time limitations on Commission forfeiture actions. LUC complaints seeking reimbursement of advertising expenditures are not forfeiture actions. Similarly, the fact that stations need keep political records for only two years does not impose a limitation on the filing of complaints. As the Bureau stated in *WTVT*, "[o]ur rules do not prescribe or limit the time during which an LUC complaint must be filed." 7 FCC Rcd 6661, at n.4. See, *Ann Richards, Clayton Williams, Jim Mattox, Tom Luce, Kent Hance, Robert Mosbacher, Jr., Tom Philips, and Buster Brown (KBMT(TV)*, 9 FCC Rcd 6051. Finally, although complainants waited approximately one year from the time they first contacted the station to the time they filed their complaint, the station had notice that its sales practices were in question and the complaint was filed before WVGA went off the air. Moreover, although WVGA has gone off the air, it is still the licensee of the station. Thus, the instant case is distinguishable from *Harvey Sloane*, 9 FCC Rcd 1592 (1994), wherein we dismissed as untimely a complaint filed over a year after the Commission had approved an assignment of the station which was the subject of the complaint. Also, in *Sloane*, the complainant had no communication with the station for nearly two years despite intervening public notices by the Commission that the license was being assigned.

Complainants' Allegations

5. Complainants claim their records establish that certain candidates paid more than other candidates for the same

[1] Section 315(b)(1) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period ....

47 U.S.C. Section 315(b)(1). *See also* 47 C.F.R. Section 73.1942(a).

[2] Section 73.1941(e) of the Commission's Rules provides:

In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; ....

class and amount of time.[3] They compare, for example, two Miller spots that ran on October 25, 1990, at 11:40 and 11:39 p.m., for which Miller paid $50.00 each, with an Isakson spot which ran on October 24, 1990, at 11:42 p.m., for which Isakson paid $75.00. Because there is no indication on the candidates' invoices specifying class of time, Complainants contend, class cannot explain the variation in price. Moreover, Complainants contend, the station's rate card indicates that the cited rates are all preemptible.

WVGA-TV's Response

6. In its response, WVGA-TV contends that with the special LUC rate card it distributed to the candidates and their agencies, candidates could purchase time at whatever rate they selected. In some instances, WVGA-TV contends, candidates chose to pay rates higher than those shown on the political rate card to insure that their spots would not be preempted. WVGA-TV further contends that its ability to respond to the Complaint is limited because, after the station went off the air, some of the records it would normally maintain have been misplaced and because staff members who had personal knowledge of the matters involved have moved and are no longer available to comment.

Finding

7. We do not find that Complainants have established a *prima facie* case of discrimination between candidates. WVGA-TV explains that the alleged rate differentials involve candidates who chose to pay grid card rates (rates higher than those listed on the lowest unit rate card) in order to lessen their risk of preemption. WVGA-TV's practice of permitting candidates to buy immediately preemptible time off the grid card at higher rates was simply allowing them to purchase higher-priced classes of time, and is not sufficient to raise a *prima facie* case of discrimination between candidates.

8. Inasmuch as Complainant's comparisons involve different classes of time, they also have not established a *prima facie* case of a violation of overcharging by Station WVGA-TV. As noted above, the comparison of rate cards with actual purchases does indicate that, while some candidates were purchasing preemptible time for charges listed on the political rate card, other candidates were purchasing preemptible time at higher grid card rates in order to reduce the risk that their spots would be preempted. However, we do not believe that this practice, alone, is sufficient to establish a *prima facie* case of overcharging. We recognize that in 1990, the relevant period of time in question, the Commission's policy, as first set forth in a 1988 *Public Notice*, was to recognize only one class of immediately preemptible time for LUC purposes. *See Public Notice*, 4 FCC Rcd 3823, 3824 (1988).

9. Subsequently, however, the Commission, in *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992), modified its policy of treating preemptible time as a single class. Therein, the Commission stated that its policy of treating all immediately preemptible time as a single class "does not appear to effectuate what Congress envisioned when it enacted Section 315(b)." (at para. 70). "[T]o reflect more accurately the realities of the advertising marketplace," the Commission thus adopted (and for the first time codified)[4] a policy of allowing broadcasters to "establish and define their own reasonable classes of immediately preemptible time."

10. Consequently, we will not apply the policy set forth in the 1988 *Public Notice*, which was not binding law, but a statement of general policy that could be challenged in any subsequent proceeding in which it was applied. *See KBMT(TV), supra*, at ¶ 23. In considering such a challenge, we note that the Commission has determined that the 1988 policy did not appear to effectuate congressional intent underlying Section 315(b). Thus, we do not believe it is appropriate to continue to apply it. *Id.* Further, no equitable factors suggest we should, nevertheless, allow Complainants to receive the benefits of that policy. For example, the 1988 *Public Notice* did not reflect any longstanding Commission policy nor is there any basis to believe that the candidates here relied upon it in deciding to purchase particular classes of time. Moreover, while broadcasters do not have total discretion under Section 315(b) to define classes of time, there is no allegation that WVGA-TV either did not disclose to complainants all of the station's classes of time or that its rates were unreasonable, manipulative or discriminatory. *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd at 691.[5]

11. ACCORDINGLY, we hereby find that Complainants have failed to make a *prima facie* case and their complaint is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[3] Complainants do not contend that the station charged commercial advertisers less than it charged political candidates.

[4] 47 C.F.R. Section 73.1942(a)(iii).

[5] It appears that WVGA-TV's rate distinctions were for a limited number of separate and distinct levels of immediately preemptible time, consistent with the 1991 policy.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-56

In the Matter of

Amendment of Part 2 of the Commission's Rules to Allocate Spectrum for Mobile-Satellite Services in the 1530-1544 MHz and 1626.5-1645.5 MHz — RM-6459

SECOND REPORT AND ORDER

Adopted: June 26, 1995; Released: July 6, 1995

By the Commission:

INTRODUCTION

1. By this action, we are reallocating the 1525-1530 MHz band to the mobile-satellite service (MSS) on a primary basis for space-to-Earth (downlink) transmissions. This action will increase the efficiency of MSS operations in the previously allocated 1530-1544 MHz band (downlink) and the 1626.5-1645.5 MHz band (Earth-to-space, or uplink) by equalizing the amount of spectrum available in each segment. This action implements a 1992 World Administrative Radio Conference (WARC-92) spectrum allocation[1] and facilitates international coordination for use of this spectrum.

BACKGROUND

2. In the *First Report and Order and Further Notice of Proposed Rule Making* (*First Report and Order/Further Notice*) in this proceeding, we allocated 14 megahertz of downlink spectrum at 1530-1544 MHz and 19 megahertz of uplink spectrum at 1626.5-1645.5 MHz to the MSS on a co-primary basis with the Maritime Mobile-Satellite Service (MMSS).[2] We also provided that MMSS distress and safety communications, such as the Global Maritime Distress and Safety Service (GMDSS), have priority access with real-time preemptive capability throughout the subject bands.[3] In addition, we proposed to reallocate five megahertz of spectrum at 1525-1530 MHz for MSS downlink use on a primary basis. We indicated that this allocation would permit enhanced efficiency of future MSS operations in the 1.5/1.6 GHz spectrum range (L-band) by equalizing the amount of spectrum in the uplink and downlink bands available for MSS communications. Currently this spectrum is part of the 1435-1530 MHz band that is allocated to the mobile service on a primary basis for aeronautical telemetry. We tentatively concluded that it does not appear to be technically feasible for aeronautical telemetry and MSS to operate in the 1525-1530 MHz band on a co-primary basis, and therefore proposed to reallocate this band on a primary basis to the MSS only. We also proposed to permit aeronautical telemetry in the band on a secondary basis, with no grandfathering of existing aeronautical telemetry users.

DISCUSSION

3. All parties submitting comments in response to the *First Report and Order/Further Notice* support our proposal to reallocate the 1525-1530 MHz band for MSS operations.[4] For example, AMSC Subsidiary Corporation (AMSC) states that there is a substantial gap between the amount of spectrum needed for MSS systems and the amount of spectrum actually available, particularly in the L-band.[5] COMSAT Mobile Communications (Comsat) states that MSS systems worldwide are facing a severe spectrum shortage, that WARC-92 allocated the 1525-1530 MHz band and other bands to relieve this congestion,[6] and that this allocation would be a significant step in the Commission's continuing efforts to relieve congestion in the MSS bands.[7] Motorola Satellite Communications, Inc. (Motorola) states that this allocation would promote the public interest by providing spectrum needed to meet the growing demand for MSS services and by equalizing the amount of spectrum in the uplink and downlink bands available for MSS.[8] Motorola also claims that the 1525-1530 MHz band will be particularly valuable to MSS operators because it can be paired with the 1626.5-1631.5 MHz band, which is adjacent to the existing worldwide MSS allocations at 1610-1626.5 MHz.[9] Loral Qualcomm Satellite Services, Inc. (LQSS) adds that because the 1525-1530 MHz band is allocated on a

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[1] *See* International Telecommunication Union *Final Acts of the World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum (WARC-92)* (Malaga-Torremolinos, 1992). In Regions 2 and 3, the 1525-1530 and 1626.5-1631.5 MHz bands were allocated on a primary basis to the MSS. Additionally, the 1530-1544 and 1626.5-1645.5 MHz bands were allocated on a primary basis for MSS use in seven countries, including the U.S., subject to conditions requiring priority access and immediate availability for maritime-mobile satellite distress and safety communications over all other MSS communications in this band.

[2] *See First Report and Order/Further Notice*, 8 FCC Rcd 4246 (1993); *Notice of Proposed Rule Making*, 5 FCC Rcd 1255 (1990).

[3] This requirement was implemented as United States footnote US315, which reads as follows: "In the frequency bands 1530-1544 MHz and 1626.5-1645.5 MHz maritime mobile-satellite distress and safety communications, *e.g.*, GMDSS, shall have priority access with real-time preemptive capability in the mobile-satellite service. Communications of mobile-satellite system stations not participating in the GMDSS shall operate on a secondary basis to distress and safety communications of stations operating in the GMDSS. Account shall be taken of the priority of safety-related communications in the mobile-satellite service." 47 C.F.R. § 2.106, footnote US315.

[4] *See* Comments of AMSC Subsidiary Corporation at 1, COMSAT Mobile Communications at 2, Constellation Communications, Inc. (Constellation) at 1, Loral Qualcomm Satellite Services, Inc. at 1, Motorola Satellite Communications, Inc. at 1 and Reply Comments of TRW Inc. (TRW) at 1.

[5] *See* AMSC Comments at 2.

[6] At WARC-92, the 1610-1626.5 and 2483.5-2500 MHz bands and the 1970-2010 and 2160-2200 MHz bands were also allocated on a primary basis to the MSS.

[7] *See* Comsat Reply at 1-2.

[8] *See* Motorola Comments at 1.

[9] *See* Motorola Comments at 3.

primary basis to the MSS worldwide, the band could be used by U.S. MSS systems proposing international as well as domestic service.[10]

4. With regard to the incumbent users, AMSC states that aeronautical telemetry should not be harmed by a shift to secondary status in the 1525-1530 MHz band. AMSC indicates that aeronautical telemetry systems could operate on a secondary basis in this band because there is sufficient satellite antenna discrimination between MSS and aeronautical telemetry to protect many types of telemetry systems.[11] AMSC also submits that the 1435-1525 MHz band, which remains allocated for aeronautical telemetry, is sufficient to accommodate relocation of such facilities that cannot share with the MSS. Comsat adds that a reallocation of the 1525-1530 MHz band to the MSS is necessary to prevent interference to telemetry equipment from mobile satellite transmissions. Both Comsat and AMSC stress in their reply comments that no opposition was received from aeronautical telemetry users.

5. LQSS states that the 1525-1530 MHz band should not be subject to the priority access and immediate availability requirements for MMSS distress and safety communications applicable to the 1530-1544 and 1626.5-1645.5 MHz bands.[12] Comsat disagrees, arguing that as a practical matter a wide-band transponder operating in the lower L band has to make provisions for GMDSS transmissions or operate on a secondary basis when distress traffic is being carried through a GMDSS satellite network. Moreover, Comsat reasons that if a MSS operator pairs the 1525-1530 MHz downlink band with an uplink band at 1626.5-1631.5 MHz, which is encumbered by International Footnote 726C, the entire transmission path is covered by the GMDSS requirements.[13]

6. We find that the reallocation of the 1525-1530 MHz band to the MSS on a primary basis would enhance the efficiency of satellite operations in the L-band by equalizing the amount of spectrum in the uplink and downlink band segments available for MSS communications. We disagree with the argument that the 1525-1530 MHz band should be subject to the priority access and immediate availability requirements for MMSS distress and safety communications. Based on the record, we are unable to identify any domestic need for additional global MMSS distress and safety spectrum. We currently require that MSS systems monitor nearby MMSS systems so that MMSS distress and safety communications receive priority access with real-time preemption in the 1626.5-1631.5 MHz and other bands. However, since we are not licensing MMSS systems in the 1525-1530 MHz band, it is not necessary to extend this requirement to include the 1525-1530 MHz band. Accordingly, no modification of footnote US315 is warranted.[14] We also observe that any proposal for additional spectrum for global MMSS distress and safety communications should have been submitted in IC Docket No. 94-31. That proceeding sought comment on a broad range of issues to assist the Commission in preparing draft U.S. proposals for the 1995 World Radiocommunication Conference (WRC-95).[15] No such proposal was submitted and we will not propose its allocation at WRC-95.

7. We also find that the existing primary allocation for aeronautical telemetry in the 1525-1530 MHz band should be downgraded to a secondary service so as not to inhibit MSS operations. Since an MSS system would serve essentially all of the nation and aeronautical telemetry operations tend to affect relatively large geographic areas, we believe that it would not be practical for those services to share the band on a co-primary basis. For instance, if we were to partition the nation into flight ranges where aeronautical telemetry is primary and the rest of the nation where MSS is primary, there would be numerous areas where an MSS operator would not be able to offer service. This would defeat one of the major advantages of satellite systems, which is nationwide coverage at a relatively low cost. Accordingly, we are allocating the 1525-1530 MHz band on a primary basis to the MSS and on a secondary basis to the mobile service for aeronautical telemetry and are modifying footnote US78 as set forth in the Appendix. Finally, we expect that the band will be in use by MSS systems by the end of 1995.[16] Therefore, aeronautical telemetry users of the band should be aware that they may have to protect or receive interference from such operations.

Other Issues

8. Several of the commenting parties address issues of eligibility that were not raised in the *First Report and Order/Further Notice*. These parties generally presuppose thatp AMSC will be authorized by the Commission to use the 1530-1544 and 1626.5-1645.5 MHz bands. AMSC seeks to restrict eligibility to use these bands to AMSC only.[17] Constellation, LQSS, Motorola and TRW ask that we open these bands immediately for the filing of applications proposing service competitive with AMSC's.[18] In addition, Motorola argues that Inmarsat's use of the MSS bands is not in the public interest, stating that Inmarsat already has access to 86 MHz of L-band MSS spectrum, but serves only

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[10] *See* LQSS Request for Clarification and Comments (Comments) at 6. We note that the 1525-1530 MHz band is allocated on a primary basis to the MSS in Regions 2 and 3 only.

[11] *See* AMSC Comments at 1 and 3.

[12] *See* LQSS Comments at 6.

[13] *See* Comsat Reply at 5-6. Note that International Footnote 726C was implemented domestically as US315.

[14] *See* note 3, *supra*.

[15] Furthermore, we note that in Recommendation No. USA-1, relating to the agenda for WRC-95, the United States recommends, *inter alia*, that the Members of the International Telecommunication Union review, and where necessary revise, the provisions of the Radio Regulations to include "appropriate provisions to indicate that maritime mobile and maritime mobile-satellite distress, urgency and safety communications should not be conducted in frequency bands where the GMDSS is not applicable...." *See* Preparation for International Telecommunication Union World Radiocommunication Conferences, *Notice of Inquiry*, 9 FCC Rcd 2430, 2451 (1994).

[16] We expect that Inmarsat will be launching its Inmarsat 3 spacecraft at the end of 1995 or early 1996. This satellite will be using these frequencies, if not throughout the nation, at least in the waterways, including the Mississippi River. Mexico has already launched its Solidaridad spacecraft that has the capability to use these frequencies. The footprint of the Solidaridad satellite covers Mexico and also the southern part of the United States.

[17] *See* AMSC Reply at 2.

[18] *See* LQSS Comments at 1, Constellation Comments at 4, Motorola Comments at 4, TRW Reply at 2-5. Further, Constellation states that we should not authorize the extension of the AMSC system into the 1525-1544 and 1626.5-1645.5 MHz

about 30,000 mobile terminals.[19] Comsat disagrees, stating that Inmarsat's 30,000 mobile terminals provide a vital service to commercial and military users.[20]

9. We are not addressing these issues herein, as they are outside the scope of this proceeding.[21] Licensing issues, including eligibility standards and operating rules, will be the subject of a new proceeding that we intend to initiate in the near future. We also wish to emphasize that no decision has yet been made on AMSC's applications for authority to operate in the 1530-1544 and 1626.5-1645.5 MHz bands.[22]

FINAL REGULATORY FLEXIBILITY ANALYSIS

10. Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the *Further Notice of Proposed Rule Making* in GEN Docket No. 90-56. Written comments on the proposals in the *Further Notice*, including the Regulatory Flexibility Analysis, were requested.

A. *Need for and Objective of Rules:* This allocation is needed to meet anticipated demand for mobile-satellite services. Our objective is to provide spectrum to meet this demand by allocating the 1525-1530 MHz band to the MSS on a primary basis and to balance the downlink segment with the uplink segment.

B. *Issues Raised by the Public in Response to the Initial Analysis:* No party suggested specific modifications to the initial regulatory flexibility analysis.

C. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives:* In the *Further Notice of Proposed Rule Making*, we proposed a spectrum allocation that we believed would address the demonstrated demand for MSS services and yet reduce administrative burdens to the public as much as possible. Based on the record, we conclude that the spectrum allocation being adopted in this proceeding is in the public interest and also minimizes the impact to small business entities. The Secretary shall send a copy of this *Second Report and Order* to the Chief Counsel for Advocacy of the Small Business Administration.

ORDER

11. ACCORDINGLY, IT IS ORDERED That Parts 2 and 87 of the Commission's Rules ARE AMENDED as specified in the Appendix, effective 30 days after publication in the Federal Register. IT IS FURTHER ORDERED That the Request for Clarification filed by Loral Qualcomm Satellite Services, Inc. IS GRANTED to the extent discussed above and IS DENIED in all other respects. This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix: Final Rules

Parts 2 and 87 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is revised to read as follows:

a. In columns (4) through (7) of the 1435-1530 MHz band, divide the 1435-1530 MHz band into two new smaller bands, the 1435-1525 MHz band and the 1525-1530 MHz band, to read as follows:

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bands until a competitive MSS industry with multiple MSS space segment licensees has been established in this country. *See* Constellation Comments at 5.

[19] *See* Motorola Comments at 3-5. Motorola suggests that we consider adopting spectrum efficiency standards for all of the MSS bands, which it says would disqualify Inmarsat's design.

[20] *See* Comsat Reply at 6. Comsat adds that Inmarsat is actively encouraging users to switch to more efficient digital terminals.

[21] In addition, we note that the comments of LQSS and Constellation concerning the possible relationship of this proceeding to ET Docket No. 92-28 are moot because the MSS allocation in that proceeding is now final. *See* Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 and 2483.5-2500 MHz Bands for Use by MSS, Including Non-geostationary Satellites, ET Docket No. 92-28, *Report and Order*, 9 FCC Rcd 536 (1994), *recon. granted in part and denied in part, Memorandum Opinion and Order*, FCC 95-70, released March 20, 1995.

[22] In the *Notice of Proposed Rule Making* in this proceeding, we stated that license applications for MSS use of the 1530-1544 and 1626.5-1645.5 MHz bands would not be accepted until the allocation proposal was finalized. 5 FCC Rcd 1255 at note 23. Subsequently, we granted a waiver of 47 U.S.C. § 319(d) to AMSC, permitting it to modify its AMSC-1 satellite -- then under construction -- by adding, at its own risk, the capability to operate at 1530-1544 and 1626.5-1645.5 MHz. This waiver was granted without prejudice to final action on AMSC's underlying application for the MMSS bands or on any related issue regarding this satellite. *See* AMSC's Applications to Modify Space Station Authorizations in the MSS, *Memorandum Opinion and Order*, 8 FCC Rcd 4040 at ¶ ¶ 36-46 (1993).

§2.106 Table of Frequency Allocations.

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International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government	Non-Government		
			Allocation MHz	Allocation MHz	Rule part(s)	Special-use frequencies (7)
(1)	(2)	(3)	(4)	(5)	(6)	
*	*	*	*	*	*	*
			1435-1525 MOBILE (aeronautical telemetry) 722 US78	1435-1525 MOBILE (aeronautical telemetry) 722 US78	AVIATION (87)	
1525-1530 SPACE OPERATION (space-to-Earth) FIXED MARITIME MOBILE-SATELLITE (space-to-Earth) Land Mobile-Satellite (space-to-Earth) 726B Earth Exploration-Satellite Mobile except aeronautical mobile 724	1525-1530 SPACE OPERATION (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Fixed Mobile 723	1525-1530 SPACE OPERATION (space-to-Earth) FIXED MOBILE-SATELLITE (space-to-Earth) Earth Exploration-Satellite Mobile 723 724	1525-1530 MOBILE-SATELLITE (space-to-Earth) Mobile (aeronautical telemetry)	1525-1530 MOBILE-SATELLITE (space-to-Earth) Mobile (aeronautical telemetry)	SATELLITE COMMUNICATION (25) Aviation (87)	
722 723B 725 726A 726D	722 723A 726A 726D	722 726A 726D	722 726A US78	722 726A US78		
*	*	*	*	*	*	*

b. The text of footnote US78 is revised to read as follows:

UNITED STATES (US) FOOTNOTES

* * * * *

US78 In the mobile service, the frequencies between 1435 and 1535 MHz will be assigned for aeronautical telemetry and associated telecommand operations for flight testing of manned or unmanned aircraft and missiles, or their major components. Permissible usage includes telemetry associated with launching and reentry into the earth's atmosphere as well as any incidental orbiting prior to reentry of manned objects undergoing flight tests. The following frequencies are shared with flight telemetry mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, 1524.5 and 1525.5 MHz.

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PART 87 - AVIATION SERVICES

1. The authority citation in Part 87 continues to read:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. Section 87.187(p) is revised to read as follows:

§ 87.187 Frequencies.

* * * * *

(p) The frequency band 1435-1525 MHz is available on a primary basis and the 1525-1535 MHz is available on a secondary basis for telemetry and telecommand associated with the flight testing of aircraft, missiles, or related major components. This includes launching into space, reentry into the earth's atmosphere and incidental orbiting prior to reentry. The following frequencies are shared with flight telemetry mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, 1524.5 and 1525.5 MHz. See § 87.303(d).

NOTE: Aeronautical telemetry operations must protect mobile-satellite operations in the 1525-1535 MHz band and maritime mobile-satellite operations in the 1530-1535 MHz band.

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3. Paragraphs (d)(1) and (d)(2) of Section 87.303 are revised to read as follows:

§ 87.303 Frequencies.

* * * * *

(d)(1) Frequencies in the bands 1435-1525 MHz and 2310-2390 MHz are assigned primarily for telemetry and telecommand operations associated with the flight testing of manned or unmanned aircraft and missiles, or their major components. The band 1525-1535 MHz is also available for these purposes on a secondary basis. Permissible uses of these bands include telemetry and telecommand transmissions associated with the launching and reentry into the earth's atmosphere as well as any incidental orbiting prior to reentry of manned or unmanned objects undergoing flight tests. In the 1435-1530 MHz band, the following frequencies are shared with flight telemetry mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, 1524.5 and 1525.5 MHz. In the 2310-2390 MHz band, the following frequencies may be assigned on a co-equal basis for telemetry and associated telecommand operations in fully operational or expendable and re-usable launch vehicles whether or not such operations involve flight testing: 2312.5, 2332.5, 2352.5, 2364.5, 2370.5 and 2382.5 MHz. In 2310-2390 MHz band, all other telemetry and telecommand uses are secondary.

NOTE: Aeronautical telemetry operations must protect mobile-satellite operations in the 1525-1535 MHz band and maritime mobile-satellite operations in the 1530-1535 MHz band.

(2) The authorized bandwidths for stations operating in the bands 1435.0-1525.0 MHz, 1525.0-1535.0 MHz and 2310.0-2390.0 MHz are normally 1, 3 or 5 MHz. Applications for greater bandwidths will be considered in accordance with the provisions of § 87.135. Each assignment will be centered on a frequency between 1435.5 MHz and 1534.5 MHz or between 2310.5 MHz and 2389.5 MHz, with 1 MHz channel spacing.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

Lawton Chiles, Bob Martinez,
Bill Nelson and Jim Smith

Against Station WFTV(TV)
Orlando, Florida

ORDER

Adopted: June 29, 1995; Released: July 6, 1995

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed June 1, 1992, on behalf of Lawton Chiles, Bob Martinez, and Bill Nelson (hereinafter, collectively, "Complainants").[1] Complainants allege that Station WFTV(TV), Orlando, Florida, overcharged them during the September 4, 1990, primary and the November 6, 1990, general elections in violation of the lowest unit charge requirements of Section 315(b) of the Communications Act of 1934, as amended.[2] Chiles and Martinez were legally qualified candidates for nomination and election for Governor of the State of Florida in the 1990 primary and general elections; and Nelson was a legally qualified candidate for nomination for Governor of the State of Florida in the 1990 primary election. The Mass Media Bureau also has before it a July 27, 1992, Opposition to the complaint filed by WFTV, Inc., the licensee of Station WFTV(TV) (hereinafter, "Station WFTV"), a March 24, 1994, Request for Leave to Supplement Complaint, and a May 4, 1994, Opposition to Request for Leave to Supplement Complaint.[3]

2. Applying the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*), to the information presented, we find that complainants Chiles, Martinez, and Nelson have established a *prima facie* case of a violation by Station WFTV of the lowest unit charge ("LUC") requirement of Section 315(b)(1) of the Communications Act with respect to the period immediately preceding the September 4, 1990, primary election. Complainants Chiles and Martinez have also established a *prima facie* case of an LUC violation by Station WFTV with respect to the period immediately preceding the November 6, 1990, general election. All Complainants have failed to establish a *prima facie* case with respect to allegations that Station WFTV did not issue timely rebates, utilized an illegal make-good policy, impermissibly increased the rates charged to candidates, discriminated between candidates with respect to rates, and failed to guarantee separation of spots. The following is a discussion of the issues raised, and a timetable and procedures for discovery, post-discovery, and election of a procedure for resolving those portions of this complaint presenting a *prima facie* case.[4]

I. OVERCHARGE ALLEGATIONS

A. Comparison With Generally-Available Statistical Data

3. The Complainants rely on generally-available statistical data to show that they were overcharged by Station WFTV. Specifically, Complainants submit projections of average Station WFTV rates for the third and fourth quarters of 1990, based on *Media Market Guide's* Spot Cost Outlook

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[1] Jim Smith was originally a party to this proceeding, but has withdrawn as a complainant. *See* Request for Leave to Supplement Complaint, dated March 24, 1994, n.3 . Accordingly, allegations concerning Smith are not considered.

[2] Section 315(b) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period and;

(2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. Section 315(b).

[3] Complainants assert that their 1994 supplement addresses recent requirements complainants must meet regarding specificity of information and supporting documentation for use of generally-available average rates, citing *Dianne Feinstein, John Seymour, Thomas Hayes, et al. (KABC-TV)*, 9 FCC Rcd 1586 (MMB 1994) (*"KABC-TV"*); *McConnell Senate Committee (WCPO-TV)*, 9 FCC Rcd 1602 (MMB 1994) (*"WCPO-TV"*); *Mitch McConnell (WLEX-TV)*, 9 FCC Rcd 1598 (MMB 1994); and *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith (WTVT(TV))*, 7 FCC Rcd 6661 (MMB 1992), *modified*, 7 FCC Rcd 7199 (MMB 1992), *review granted in part and denied in part*, 8 FCC Rcd 131 (1992) (*"WTVT(TV)"*). The Bureau has acknowledged that *WTVT(TV)* imposed a new standard of specificity, requiring complainants to provide more precise information regarding the manner in which generally-available average rates are utilized. 7 FCC Rcd at 6662, n.8. Accordingly, since the WFTV Complaint was filed before the Bureau's *WTVT(TV)* decision was released, we will accept the information contained in the supplement and opposition thereto regarding the use of generally-available average rates, including the ratings source upon which Complainants relied and the multiplier used in calculating their station specific figures. Complainants, however, do not indicate how, in their view, the cases released after *WTVT(TV)* have changed the "requirements" in any way relevant to their instant complaint, and it is far from apparent to us. Accordingly, we will not accept any evidence in the supplement or opposition thereto, which is not put forth to explain the use of generally-available average rates. Specifically, in this case, any new invoices supplied by the Complainants in their supplement will not be accepted.

[4] In addition to refund of any overcharges, Complainants seek relief in the form of interest and attorney's fees. We need not decide here whether the Commission has the authority to employ such additional remedies as we do not find, at this time, that the remedies of interest and attorney's fees are warranted in this case.

and Projections data for households ("SCOOP") and Arbitron's July and November 1990 household ratings. Station WFTV opposes the use of such generally-available statistical data and offers its own comparison using Nielsen's household ratings.[5]

4. To establish a *prima facie* case, a complainant must, at a minimum, submit "a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513. A complainant must describe the specific factual basis for its belief that a station has committed a violation, rather than, for example, merely making a general allegation that a station has overcharged candidates. *WTVT(TV)*, 7 FCC Rcd at 6662-63, 8 FCC Rcd at 132. In the *Declaratory Ruling*, 6 FCC Rcd at 7521, n.47, the Commission specifically endorsed the use of generally-available industry or statistical data on average rates, such as SCOOP and Spot Quotations and Data, Inc.("SQAD"), to make a *prima facie* case of an LUC violation. As we stated in *WTVT(TV)*, 7 FCC Rcd at 6663, n.11, a *prima facie* case of an LUC violation would otherwise be difficult to make. Thus, we reject Station WFTV's contentions that SCOOP cannot be used to establish a *prima facie* case of overcharges. We likewise reject Station WFTV's alternative analysis using Nielsen rating data. Although the station's Nielsen analysis may be accurate, it does not negate the validity of Complainant's SCOOP analysis. *See WTVT(TV)*, 7 FCC Rcd at 6662, n.10 (submission of SCOOP data and analysis did not negate the validity of Complainants' SQAD showing). Of course, if any overcharges are ultimately found, and rebates are ordered, they will be based on the difference between the rates actually charged by the station and the LUC. *Id.* at 6662, n.9, and 6663.

5. A comparison of Complainants' invoices with SCOOP averages reveals that, even taking rebates into account, all Complainants paid more than Scoop averages in a substantial number of instances, during the LUC period preceding the 1990 primary election and that Chiles and Martinez paid rates greater than the SCOOP averages in a substantial number of instances during the period preceding the 1990 general elections. Thus, we find that complainants Chiles, Martinez, and Nelson have established a *prima facie* case of an LUC violation with respect to rates they were charged by Station WFTV for spots in the period immediately preceding the 1990 primary election and that Chiles and Martinez have also established such a *prima facie* case for the period immediately preceding the 1990 general election.[6]

II. REBATE ALLEGATIONS

6. Complainants contend both that the issuance of rebates by Station WFTV is grounds for finding an LUC violation and that the rebates made by the station were untimely.[7] Station WFTV states that during the course of the LUC period, it periodically reviewed the lowest commercial rates and compared such rates with those charged to political candidates. It also contends that it reviewed its political sales following the election and believes candidates have now been rebated to the lowest unit charge for spots purchased.

7. Broadcasters have long been required to make rebates to political candidates who paid more for an advertising spot than a commercial advertiser for the same class and length of spot during the same time period. *See Public Notice, Licensees and Cable Operators Reminded of Lowest Unit Charge Obligations*, 4 FCC Rcd 3823, 3824 (1988) (*"1988 Public Notice"*). However, it was not until the codification of the Commission's political programming policies in 1991, that the Commission specifically stated that all rebates had to be made in a timely fashion. *See Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 694 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992) (*"Codification"*) ("We . . . will henceforth require that stations review their program logs periodically during the election period to determine whether rebates are required, and issue any such rebates or credits promptly"); *see also* 47 C.F.R. § 73.1942(a)(ix). This complaint concerns the 1990 LUC period, and we did not specify the necessity of making timely rebates until 1991. We cannot find the station culpable for violation of a rule which did not exist at the time of its violation. Further, as we have already found that Complainants have established a *prima facie* case of LUC violation, we need not decide whether or not Station WFTV's issuance of rebates supports Complainants' allegations of overcharges.

III. ALLEGED MAKE-GOOD VIOLATIONS

8. Complainants allege that Station WFTV had an illegal make-good policy in effect during the 1990 election period, and that the effect of such a policy was to steer candidates toward the purchase of higher priced spots. Specifically, Complainants object to Station WFTV's position that it would not guarantee make-goods of preempted spots.

9. Station WFTV admits that, although it made every effort to do so, it did not guarantee make-goods of preempted spots. It asserts, however, that its policy in this regard was in compliance with FCC rules at the time of the 1990 election in that it treated commercial and political

[5] Station WFTV asserts that the use of SCOOP rates is inappropriate because the SCOOP analysis is based on projected and not actual rates, makes no distinction between charges for different programs within a daypart, and does not include different rates for all the time periods offered by the station.

[6] Complainants also allege that they were charged more than the highest rate acknowledged by the station. In support of their assertion, Complainants cite to the 1990 edition of the *Television and Cable Factbook* (*"Factbook"*) which lists Station WFTV's highest thirty second spot rate as $4,000. In response, Station WFTV states that "management has no record or recollection of supplying this information to the publication." It asserts that the *Factbook* is wrong, that $4,000 was not the highest rate it charged to a commercial advertiser in 1990, and that, in any event, the 1990 *Factbook* contained 1989 rates. We need not reach this issue in this proceeding as we have already found that Complainants have established a *prima facie* case of LUC violation by Station WFTV.

[7] Complainants further assert that in re-auditing its political sales, Station WFTV continually changed its characterization of classes of time purchased, thus negating the significance of different classes of time. Station WFTV acknowledges that mistakes were made in its first audit, primarily, it contends, due to typographical transcription errors. We find that Station WFTV's erroneous listing of the classes of time purchased in connection with its audits does not negate the distinctions between the station's classes of time.

advertisers alike. Station WFTV further asserts that it did not steer candidates toward purchase of higher priced fixed time and that Complainants provided no specific evidence that the station attempted to do so. Finally, Station WFTV points out that all Complainants purchased both fixed and preemptible time.

10. At the time of the 1990 Florida elections, stations were required to air political make-goods prior to an election only if they provided their most-favored advertiser with such time-sensitive make-goods. *See 1988 Public Notice*, 4 FCC Rcd at 3823. Station WFTV has asserted that it did not guarantee make-goods to either commercial or political advertisers. Further, as Station WFTV indicates, Complainants have provided no evidence that they were in any way steered toward the purchase of higher priced time. In fact, evidence suggests the contrary since all Complainants purchased both preemptible and non-preemptible time. Accordingly, we find that Complainants have failed to establish a *prima facie* case that Station WFTV had an illegal make-good policy or otherwise attempted to steer candidates toward the purchase of higher priced time.

IV. ALLEGATIONS CONCERNING RATE INCREASES

11. Complainants claim that Station WFTV impermissibly increased its preemptible and fixed rates during the 1990 general election period. The complaint does not give any specific examples of such increases. Citing *Spot Television Rates and Data*, Complainants argue that it was Station WFTV's policy to provide rate protection to its commercial advertisers and that candidates were penalized because, unlike commercial advertisers, they did not buy spots over a long period of time. Complainants offer no factual support for this position. Station WFTV's Opposition denies that rates were increased beyond what was usual and customary in the third and fourth quarter. Station WFTV also asserts that although commercial rates during this time did increase, for the most part, political rates did not. Further, Station WFTV contends that rate protection was provided to commercial and political advertisers alike. Finally, Station WFTV points out that any rate protection granted to a commercial advertiser would, pursuant to LUC requirements, also benefit a political advertiser who purchased the same amount and class of time which aired during the same time period.

12. The Commission has long recognized that a station can increase its rates as the result of its normal business practices. *See 1988 Public Notice*, 4 FCC Rcd 3823. Further, as Station WFTV indicates, had there been any long-term commercial contracts, candidates would have been entitled to any benefits arising therefrom. *See Codification*, 7 FCC Rcd at 693-94. Complainants do not claim that long-term commercial rates were not included in Station WFTV's LUC calculations or that they paid more than any commercial advertiser – long term or not – for similar spots. Accordingly, we find that Complainants have failed to establish a *prima facie* case that Station WFTV impermissibly raised its rates, and their allegations in this regard are dismissed. *See, KABC-TV*, 9 FCC Rcd at 1588.

V. ALLEGED RATE DISCRIMINATION*

13. Complainants claim that Station WFTV discriminated in the advertising rates which it charged different candidates, in violation of Section 73.1941(e) of the Commission's Rules. 47 C.F.R. Section 73.1941(e). Complainants cite two examples of different rates charged two opposing candidates for advertising during the same dayparts. In response, Station WFTV asserts that Complainants' alleged examples of rate discrimination are inaccurate and that, in both cases, either one of the spots did not run or was not ordered. Further, we note that the complaint does not indicate the length and class of the spots at issue. If the spots are of different classes or lengths, rate distinctions do not amount to discrimination. *See KABC-TV*, 9 FCC Rcd at 1588. Because of the apparent errors in Complainants' examples and because Complainants have not provided information as to class and length of time, they have failed to establish a *prima facie* case with respect to rate discrimination, and this claim will be dismissed.

VI. ALLEGATIONS REGARDING SEPARATION OF SPOTS

14. Complainants also allege that Station WFTV violated the Communications Act by failing to separate spots for candidates. However, separation of spots is irrelevant to the issue of lowest unit charge. *Lawton Chiles, Bob Martinez, Bill Nelson and Jim Smith (WCIX-TV)*, 8 FCC Rcd 4019, 4023 (MMB 1993).

VII. TIMETABLE AND PROCEDURES FOR DISCOVERY

15. In the *Declaratory Ruling*, the Commission determined that, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery, subject to specific conditions established by the Bureau. *See Declaratory Ruling* at 7513-14, 7521, n.49. *See also, WTVT(TV)*, 7 FCC Rcd at 6665. Accordingly, we will allow all Complainants limited discovery on the issue of overcharges during the 45 days before the September 4, 1990, primary election. We will allow complainants Chiles and Martinez limited discovery on the issue of overcharges during the 60 days preceding the November 6, 1990, general election. The documents set forth in Appendix A to this *Order*, and answers to the written interrogatories set forth in Appendix B to this *Order*, must be served upon counsel for Complainants (not the Commission) by Station WFTV on or before the first day of the discovery period, which will be 30 days after the release date of this *Order*. *See* Appendix C.

16. Any request for further discovery by Complainants must contain a showing that such discovery is necessary to resolve the issue of overcharges. Any discovery request by Station WFTV for production of documents, answers to written interrogatories, or for the taking of depositions must demonstrate that the information requested is necessary for Station WFTV to respond to arguments or claims that could be made by Complainants in their amended complaint. We emphasize that any request for depositions must also demonstrate that depositions are necessary to resolution of the issue of overcharges and include a list of

the proposed deponents.[8] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible.

17. Documents produced by Station WFTV that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, the name(s) of any person employed by the advertiser, and the name of any media company or agency representing the commercial advertiser and any person employed by such media company or agency. Where any such information is redacted, Station WFTV shall advise Complainants of the type of information deleted. Further redactions will be allowed only if the information redacted is proprietary and not relevant to resolution of the complaint. Should Complainants serve documents upon Station WFTV they may redact proprietary information and so advise Station WFTV of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact. As with all discovery matters, the parties should make good faith attempts to resolve any discovery disputes before presenting such a dispute to the Bureau.

18. Any documents, answers to written interrogatories, or deposition transcripts, if any, produced during discovery, and the information revealed thereby, shall not be provided to any third party other than the Commission. Copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp.

19. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to Complainants, the management of Station WFTV, their attorneys and staffs, and expert witnesses. Either party may require the other to disclose in writing the names of staff and experts who have access to documents and written information. Each party must explain to all staff and experts that the documents, answers to written interrogatories, deposition transcripts, and their contents may not be disclosed to any entity other than the Commission.

20. None of the materials produced, nor the contents thereof, may be used for any purpose other than the prosecution of the instant complaint. Each individual who is provided access to these materials is hereby required to certify in writing that he or she has personally reviewed this order and understands the limitations imposed on the signing party. No copies of materials protected by this order may be made except copies to be used by the persons identified in paragraph 22. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided. Upon termination of this proceeding, including any appeals, petitions or settlement, all originals and reproductions of any protected materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the protected materials of an opposing party shall be destroyed.

21. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may warrant. Such agreement should be confirmed in writing and a copy provided to the Bureau. As noted in the *Declaratory Ruling*, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the complaint or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. Section 1.24.

22. Extensions of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or both parties submit declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

23. Within 30 days after completion of discovery, Complainants must file an amended complaint, alleging specific facts based on the information discovered, stating the nature of the Section 315(b)(1) violation and the amounts said to be owed. After Station WFTV has filed its answer, the parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution.

24. Settlement of lowest unit charge claims is strongly encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. *See Declaratory Ruling*, at 7521, n. 52.

25. ACCORDINGLY, we find that a *prima facie* case of a violation of the Commission's LUC requirement has been established by Complainants in connection with advertising aired on Station WFTV on their behalf during the 45 days before the September 4, 1990, primary election. We also find that a *prima facie* case of a violation of the Commission's lowest unit charge requirement has been established by complainants Chiles and Martinez in connection with advertising aired on Station WFTV on their behalf during the 60 days preceding the November 6, 1990, general election. The parties are hereby ORDERED to follow the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established herein.

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[8] *See WTVT(TV)*, 8 FCC Rcd at 717. In this regard, we require the party seeking depositions "to demonstrate with respect to *each* witness they seek to depose, that the individual's testimony is necessary to the resolution of the issues upon which discovery has been granted." This must include "*specific* arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence." *Id.*

26. We find that Complainants did not establish a *prima facie* case with respect to allegations that Station WFTV failed to issue timely rebates, utilized an illegal make-good policy, impermissibly increased the rates charged to candidates, discriminated between candidates with respect to rates, and failed to guarantee separation of spots. Thus, those claims are DISMISSED as to all Complainants.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANTS

Certain documents shall be produced to Lawton Chiles, Bob Martinez, and Bill Nelson[9] (hereinafter, collectively, "Complainants") by Station WFTV by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060 in accordance with the procedures outlined in this Order. The documents to be produced are as follows:

1. All advertising contracts executed by or on behalf of candidates for public office in connection with the 1990 primary and general elections.

2. All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the 1990 primary and general elections.

3. Copies of invoices and contracts for, and program logs related to: all commercial time run on Station WFTV beginning on July 21, 1990, and running through September 4, 1990 (the 45 days preceding the relevant primary election); and all commercial time run on Station WFTV beginning on September 7, 1990, and running through November 6, 1990 (the 60 days preceding the relevant general election).

This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired, and, if not apparent from the preceding, documents reflecting all agency discounts provided by the station;

b) All long term contracts that pertain to commercial spots, including make-goods and bonus spots, that aired during this period;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order;

d) All orders for commercial spots aired during this period, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during this period; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during this period.

4. All documents used by Station WFTV to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of Section 315(b) of the Communications Act. This should include any written policy statement(s) used by Station WFTV in 1990 which directly or indirectly related to Station WFTV's pricing policies.

5. All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of Station WFTV with respect to the 1990 primary and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by Station WFTV in performing any such audit or providing any such rebates.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS

Answers to the following interrogatories shall be provided to Complainants in accordance with the procedures set forth in this *Order:*

1. Describe how Station WFTV arrived at its lowest unit charge ("LUC") in 1990.

2. Detail any actions taken by Station WFTV to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1990 statutory LUC periods. This should include the identities of all individuals taking or participating in such action, identifying their position at Station WFTV, and should identify all documents which refer to or formed a part of Station WFTV's efforts to ensure that candidates received the LUC.

[9] Since Bill Nelson was a legally qualified candidate only for nomination for Governor of the State of Florida in the 1990 primary election, discovery with regard to his case is limited to advertisements which aired in connection with the 1990 primary election.

3. Provide a statement that indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time period.

4. Provide a statement that explains any codes used by Station WFTV or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period (30 days after release of this *Order):*	Day 1
Documents in Appendix A and Answers to Written Interrogatories in Appendix B due:	Day 1
Request by Complainants for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due:	Day 15
Opposition by Station WFTV to Complainants' request for further discovery due:	Day 20
Station WFTV's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due:	Day 20
Opposition by Complainants to Station WFTV's request for discovery due:	Day 27
Documents and answers to written interrogatories (if allowed by Bureau) pursuant to Station WFTV's request for discovery due:	Day 45
Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to Complainants' request for further discovery due:	Day 60
Final day of discovery period:	Day 60
Complainants' amended complaint due:	Day 90
Station WFTV's answer to amended complaint due:	Day 105
Joint notice of election of complaint resolution procedure due:	Day 116

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Oregon, Inc. — CUID No. OR0231 (Washington County)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1995; Released: July 7, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Los Angeles County — CUID No. CA0097 (Arcadia)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1995; Released: July 7, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Central Iowa, Inc. CUID No. IA0365 (Traer)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1995; Released: July 7, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon the filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994 against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jones Intercable, Inc. CUID Nos. IL1056 (Naperville)
MD0250 (Calvert County)

Benchmark Filings to Support
Cable Programming Service Prices

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1995; Released: July 7, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are equal to or lower than the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI of Indiana, Inc. CUID No. IN0034 (Bloomington)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 29, 1995; Released: July 7, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rural Missouri Cable TV, Inc. — CUID No. MO0048 (Branson)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 29, 1995; Released: July 7, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint in the franchise area which is the subject of this Order was completed and served on Operator on December 13, 1993 and received by the Commission on December 16, 1993. Operator filed FCC Form 393 in response on February 22, 1994.

5. Operator asserts that its monthly CPS tier price of $8.50 (plus franchise fee) is justified by its benchmark filing because its price is equal to or lower than the maximum permitted charge of $8.58 per month (plus franchise fee), as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

a. In its most recent filing, Operator entered $13.00 for the basic service tier and $8.50 for the CPS tier on Form 393, Part II, Worksheet 1, Line 101 as its current monthly rates as of the initial date of regulation. However, Operator's rate card indicates that its actual monthly rates, excluding franchise fees, were $12.44 for the basic tier and $8.54 for the CPS tier. The instructions to Form 393 require the operator to enter on Line 101 its actual current monthly charges. We have therefore corrected Line 101 to match the figures on Operator's rate card.

b. Because Operator has failed to demonstrate that its price for the CPS tier was not unreasonable, we will set a price for this tier, incorporating the adjustment discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, using the most accurate data currently available. On July 29, 1994, the U. S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 126.5 for the fourth quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor of 1.034 through December, 1993, the base date Operator used in justifying its rates.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $8.51 per month (plus franchise fee) for the period from December 16, 1993 to May 14, 1994.[11] However, we further determine that the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the franchise area referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's Rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum permitted price of $8.51 (plus franchise fee).[12]

9. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

[11] This finding is based solely on the representations of Operator and the modifications described herein. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[12] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-88

In re Application of

COMMUNITY EDUCATIONAL ASSOCIATION
Holly Hill, Florida

File No. BPED-930316MF

For a Construction Permit for a
New Noncommercial Educational
FM Station on Channel 212 A

MEMORANDUM OPINION AND ORDER

Adopted: June 29, 1995; Released: July 7, 1995

By the Review Board: MARINO (Chairman) and GREENE.

1. On March 14, 1995, Administrative Law Judge Joseph Chachkin (ALJ) issued an *Initial Decision*, 10 FCC Rcd 3179, *(I.D.)*, which granted the construction permit application of Community Educational Association (CEA) for a new noncommercial educational FM station at Holly Hill, Florida.

2. Now before the Review Board are the following pleadings: (a) a petition for reconsideration and a petition to intervene, filed on April 19, 1995, by WCPX License Partnership, licensee of Television Station WCPX-TV, and supplemented on April 24, 1995, in which WCPX alleges it is an affected TV Channel 6 station that will receive predicted interference from the grant of CEA's proposed facility sufficient to be violative of 47 CFR § 73.525(c); (b) a letter supplement to the petitions above, filed June 20, 1995, by WCPX, requesting withdrawal of such petitions provided that the grant of CEA's application is conditioned on CEA's installation of filters to 999 of the viewers in the predicted interference area; (c) an amendment to CEA's application, filed June 21, 1995, by CEA, advising that it will install the requested filters; and (d) comments by the Mass Media Bureau, filed June 23, 1995, reporting that it has reviewed CEA's engineering amendment and determined that the amendment and CEA's proposal are in compliance with all relevant provisions of the Commission's Rules. The Bureau supports acceptance of the amendment and urges the dismissal of the petitions for intervention and reconsideration as rendered moot with acceptance of the amendment.

3. Both the petition to intervene and the petition for reconsideration, which were originally filed with the ALJ, were informally referred by him to the Board because he had lost jurisdiction over the pleadings after issuance of the *Initial Decision*. *See* 47 CFR § 0.341; *see also Midwest St. Louis, Inc.*, 79 FCC 2d 519, 531-540 (1980). Misdirected pleadings are to be informally referred to the appropriate official or body which has jurisdiction to act on such matters. *See CSJ Investments, Inc.*, 5 FCC Rcd 7653 n.4 (1990). Under 47 CFR § 0.365(a) and (b), the Board, which has been delegated authority in all adjudicative cases to act on exceptions to initial decisions and appeals from other rulings, has jurisdiction because the pleadings, which are in the nature of exceptions, were filed in a timely manner. *Cf. Leigh Valley Community Broadcasters Association, Inc.*, 9 FCC Rcd 1642 (Rev. Bd. 1994) (Board lacked jurisdiction to consider pleading alleging TV channel 6 interference filed more than 30 days after ALJ's final order). We will accept the amendment and dismiss the petitions.

4. CEA's transmittal letter accompanying the June 21 amendment further requests that the FM Branch be directed to issue the construction permit to CEA within twenty days of release of this *Order*. Because we have no delegated authority that would permit us to issue such a directive, CEA's request is denied.

5. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration and the Petition to Intervene, filed by WCPX License Partnership on April 19, 1995, and supplemented on April 24 and June 20, 1995, ARE DISMISSED; that the amendment, filed June 21, 1995, by Community Educational Association IS ACCEPTED; and that the following condition BE ATTACHED to Communication Educational Association's construction permit application (File No. BPED-930316MF) granted by *Initial Decision*, 10 FCC Rcd 3179 (ALJ 1995):

> grant of construction permit is subject to a condition that Communication Educational Association install filters for 999 of the viewers residing in the predicted interference area of Station WCPX-TV, Channel 6, within 90 days after commencing program tests and, no later than 45 days thereafter, provides WCPX-TV with a certification containing sufficient information to permit verification of such installation.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Florida, Inc. CUID No. FL0973 (Upper Matecumbe)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: June 26, 1995; Released: July 3, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to or lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. §543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-136

In re Application of

ELLIS THOMPSON CORPORATION File No. 14261-CL-P-134-A-86

For Facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 134
Atlantic City, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: June 28, 1995; Released: July 7, 1995

By the Review Board: MARINO (Chairman) and GREENE.

1. On March 27, 1995, Ameritel filed an Appeal pursuant to 47 CFR § 1.301(a)(1) from the denial by Administrative Law Judge Joseph Chachkin (ALJ) of its petition to intervene in this proceeding as a party-in-interest. *Memorandum Opinion and Order*, FCC 95M-68, released March 7, 1995 (*MO&0*). Ameritel claims that the ALJ's ruling is in direct conflict with *Algreg Cellular Engineering*, 6 FCC Rcd 5299, 5300 (Rev. Bd. 1991) (subsequent history omitted), which held that both Congress and the Commission have stated that a mutually exclusive applicant has a right to intervene as a party-in-interest on the question of whether a lottery winner is fully qualified. Appeal at 3-4. Oppositions were filed on April 6, 1995, respectively, by Ellis Thompson Corporation, American Cellular Network Corp, and Telephone and Data Systems, Inc. We affirm the ALJ's denial of intervention because Ameritel's original petition to intervene did not establish, as required by 47 USC § 309(d) and (e) of the Communications Act of 1934, as amended, and 47 CFR § 1.223(a) of the Commission's Rules, that Ameritel is a mutually exclusive applicant and therefore entitled to intervene as a "party-in-interest." We also agree with the ALJ that Ameritel failed to establish that its participation would assist the Commission in resolving the designated issue and that it should, therefore, be permitted to intervene as a matter of discretion.

2. *Background:* To expedite the licensing of cellular radio facilities, the Commission streamlined its comparative proceedings so that the initial selection from a pool of competing applications is made by lottery rather than the traditional comparative hearing. *See Algreg Cellular Engineering*, 9 FCC Rcd 5098, at 5108 ¶ 8 (Rev. Bd. 1994) (subsequent history omitted). After selection of a winner, competing applicants can challenge the winning applicant's basic qualifications; and, when necessary, a trial-type hearing will be designated pursuant to 47 USC 309(e). *See Algreg Cellular, supra*, 6 FCC Rcd at 5300 ¶ 8. Here, the application of Ellis Thompson was the winning lottery application for Atlantic City, New Jersey. Following a court remand, however, the Commission designated Ellis Thompson's application for hearing to determine whether "a third party became a real party in interest in the Thompson application contrary to the Commission's rule." *Hearing Designation Order*, 60 Fed. Reg. 1776, published on January 5, 1995; 9 FCC Rcd 7138 (1994) (*HDO*). Ameritel was not named a party to the hearing.

3. On February 6, 1995, Ameritel filed its petition to intervene asserting that Ameritel is an Ohio general partnership and the successor-in-interest to Ameritel, Inc., a mutually exclusive applicant for the Atlantic City, New Jersey cellular authorization, and that, pursuant to unambiguous Commission precedent, including *Algreg Cellular, supra*, it was entitled to intervene as a party-in-interest as a matter of right. To support the claim of being the successor-in-interest to Ameritel, Inc., Ameritel attached to its petition the following declaration under penalty of perjury by Richard Rowley:

> 1. I am a general partner in Ameritel ("Ameritel"), successor-in-interest to Ameritel, Inc.
>
> 2. I have reviewed the foregoing "Petition To Intervene" ("Petition") to be filed on behalf of Ameritel with the Federal Communications Commission ("Commission") with respect to the hearing designated by the Commission in CC Docket No. 94-136 in connection with the application of Ellis Thompson Corporation for nonwireline cellular facilities to operate on frequency block A in Atlantic City, New Jersey (File No. 14261-CL-P-134-A-86).
>
> 3. Except for those facts of which official notice may be taken by the Commission, all facts set forth in the foregoing Petition are true and correct of my own personal knowledge and belief.

Comments and oppositions were filed by other parties to the hearing, including the Wireless Telecommunications Bureau.

4. On March 7, 1995, the ALJ denied the petition to intervene as of right, stating:

> [1] Ameritel has failed to establish that it is the successor-in-interest to Ameritel, Inc., the 1986 applicant for the nonwireline authorization. Ameritel's claim rests solely on the bare declaration of Richard Rowley, a general partner in Ameritel. Ameritel offers no supporting evidence for Rowley's assertion.
>
> [2] In any event, the available facts do not support a finding that Ameritel is the successor-in-interest of Ameritel, Inc. As related by the parties, based on state records, Ameritel, Inc., the applicant, ceased to exist as a separate entity when it was merged into another entity, Metrotec, Inc. on June 15, 1988. Further, while a new entity called Ameritel, Inc., was incorporated in Ohio in 1993, there is no record of a general partnership under the name of Ameritel doing business in Ohio. Under Ohio law, all persons or entities transacting business in the state must, at very least, file a fictitious name report with the Secretary of State (see Amcell Opposition, Exhibit 1).

MO&O at ¶ 3.

5. In its appeal, Ameritel urges that it "clearly stated its status and its right to intervene" in its original petition and that this showing was "unequivocally supported by a Declaration under penalty of perjury by Richard Rowley, a person with personal knowledge of these facts," and further argues that the ALJ's erroneous ruling was caused when the parties opposing intervention "mounted a campaign of disinformation based on incomplete, inaccurate and misleading allegations." Appeal at 3-4. Ameritel claims that, at minimum, it should have been afforded the opportunity to reply to the oppositions before the ALJ denied its petition. *Id.* at 4-5. Ameritel charges that by denying it intervention, the ALJ acted arbitrarily, contrary to established precedent, and in violation of its due process rights. *Id.* at 5.

6. *Discussion:* Ameritel's argument ignores a fatal legal flaw in its original petition to intervene: its petition did not contain specific allegations of fact sufficient to show that Ameritel was the successor-in-interest to Ameritel, Inc., a mutually exclusive applicant, and, therefore, a party-in-interest. Section 309(d)(1) of the Communications Act specifically provides:

> The petition shall contain specific allegations of fact sufficient to show that petitioner is a party in interest.... Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

Section 1.223(a) of the Commission Rules requires a party-in-interest to file "under oath and not more than 30 days after publication in the Federal Register of the hearing issues.... a petition for intervention showing the basis of its interest." The ALJ correctly held that Ameritel's allegation of party status that it was the successor-in-interest to Ameritel, Inc. rested "solely on the bare declaration of Richard Rowley" and offered "no supporting evidence for Rowley's assertion." Rowley did not offer any explanation about how, when, and by whom Ameritel, Inc., a corporation, had been changed to a partnership. Nor did Ameritel's petition incorporate, or ask the ALJ to take official notice of, any documents which supported the legal conclusion that it was the successor-in-interest to Ameritel, Inc. *Algreg Cellular,* 6 FCC Rcd at 5300, on which Ameritel mainly relied, is to no avail because, unlike in *Algreg,* where the party requesting intervention established in its petition that it was a mutually exclusive applicant, Ameritel did not do so here.

7. Some sixty days after publication of the *Hearing Designation Order,* para. 2 above, and subsequent to the ALJ's ruling, Ameritel on March 21, 1995, filed a response to the oppositions, attaching a new four page affidavit and three pages of documents to support its claim that it was the successor-in-interest to Ameritel, Inc. Appeal, Attach Ex. 5 at exh. 1 pp. 1-4. By *Order,* FCC 95M-84, released March 24, 1995, at n.1, the ALJ stated that "Ameritel provides no explanation for its inexcusably tardy pleading, which will be dismissed." Ameritel now argues that the ALJ should have awaited or sought its reply to the oppositions before denying intervention. Appeal p. 4-5. No authority is cited to support this argument and Ameritel itself recognizes that Section 1.294 of the Rules does not permit a response to an opposition to petition to intervene. We note that Section 309(d)(1) of the Act, 47 USC § 309(d)(1), contemplates the filing of only a petition to intervene to which the applicant "shall be given an opportunity to reply." Thus, Ameritel's response was not only unauthorized by these legal requirements; it was also filed long after the 30-day time period, a date certain for justifying intervention established by 47 USC § 309(e), and 47 CFR § 1.223(a). *See also Algreg Cellular, supra,* 6 FCC Rcd at 5300 ¶ 6 referring to 1964 amendment to § 309 establishing a thirty-day "date certain" for intervention. Given these specific statutory and Commission requirements, we do not believe that it is appropriate for the Board to consider the substance of Ameritel's untimely and unauthorized response or the parties' oppositions thereto. We note that the pleading merely attempts to establish Ameritel's status as the successor-in-interest but does not raise any public interest questions about Ellis Thompson that would warrant Commission attention. The ALJ did not err in denying intervention as of right.

8. In the last footnote of its Appeal (at 5, n.9), Ameritel claims that it was also incorrectly denied discretionary intervention by the ALJ. Section 1.223(b) of the Commission's rules, 47 CFR § 1.223(b), which confers the ALJ with discretion to allow intervention, requires, among other things, that a petitioner must show how its "participation will assist the Commission in the determination of the issues in question." Applying the Commission's requirements, the ALJ reasoned that:

> Other than to offer the Commission its assistance in 'fully exploring the relationship between' the parties to this proceeding, Ameritel does not demonstrate that it will make any specific contribution to the resolution of the designated issue. Nowhere does Ameritel allege, much less show, that if it is not allowed to intervene, important issues of fact or law will not be adequately raised or argued. Ameritel appears to believe its presence is required to ensure that the examination of Ellis Thompson's qualifications as a licensee in the hearing is sufficiently thorough. Ameritel ignores the fact that the Wireless Bureau is a party. Ameritel offers no evidence that the Wireless Bureau will be less than vigorous in its prosecution of this case. The Presiding Judge is fully confident that the Bureau's participation and that of the other named parties assures that the designated issue will be fully explored.

MO&O at ¶ 6. We agree with the ALJ that Ameritel did not demonstrate that "it will make any specific contribution to the resolution of the designated issue." We therefore affirm his ruling. *See Telephone Data Systems, Inc.,* 9 FCC Rcd 2780, 2781 (Rev. Bd. 1994) (denial of discretionary intervention where petitioner had failed to show that "its participation will assist the Commission in the resolution of the issues as hand").

9. ACCORDINGLY, IT IS ORDERED, That Ameritel's Appeal filed on March 27, 1995, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision of New Jersey, Inc. — CUID No. NJ0210 (Cresskill)

Benchmark Filing to Justify Cable Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: April 24, 1995; Released: April 28, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price Cablevision of New Jersey, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Lake County Cablevision — CUID Nos. FL0064, Fruitland Park; FL0239, Lake; FL0300, Lake; FL0819, Lady Lake; FL0856, Lady Lake; FL0879, Mt. Plymouth/Sorrento; FL0880, Sorrento; FL1090, Lake (SE)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1995; Released: April 26, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Lake County Cablevision ("Operator") was charging for its cable programming service ("CPS") tier in Fruitland Park, Florida. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. This Order applies only to Operator's CPS rates within Fruitland Park, Florida, CUID No. FL0064. The complainant, the City of Fruitland Park, listed several other CUID numbers on the complaint instead of identifying FL0064 as the correct CUID number. Operator argues that the complaint should be dismissed since it did not identify the correct CUID number and since it listed the CUID numbers of communities which are outside the City's franchise area. Although we will not dismiss the complaint for failure to identify the proper CUID number, this Order rules on Operator's CPS rates only in Fruitland Park since the complainant is not a "subscriber, franchising authority, or other relevant state or local government entity" with respect to rates which are charged outside its franchise area. *See* 47 C.F.R. § 76.950. Thus, the complaint filed by the City of Fruitland Park does not constitute a pending valid complaint in the communities that were listed by the City under the following CUID numbers: FL0239, FL0300, FL0819, FL0856, FL0879, FL0880, and FL1090.

5. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is lower than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price. [11]

6. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that Operator's motion to dismiss the complaint referenced herein IS GRANTED AND DENIED TO THE EXTENT INDICATED HEREIN.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

7. IT IS FURTHER ORDERED that the complaint referenced herein is dismissed insofar as it applies to CUID Nos. FL0239, FL0300, FL0819, FL0856, FL0879, FL0880, and FL1090.

8. IT IS FURTHER ORDERED that the complaint referenced herein against the cable programming service price charged by Operator in Fruitland Park, Florida IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable — CUID Nos.
MN0196 (Eden Prairie)
MN0197 (Edina)
MN0198 (Hopkins)
MN0199 (Richfield)
MN0200 (Minnetonka)

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 24, 1995; Released: April 28, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a single complaint about the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection andCompetition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. The complaint was completed and served on Operator on November 2, 1993 and received by the Commission on November 8, 1993. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on July 11, 1994.[11] Operator further amended its justification on March 1, 1995, March 24, 1995, and April 17, 1995, in response to Commission letters which requested clarification of Operator's showing.[12]

5. On November 26, 1993, Operator filed a Motion to Dismiss the complaint referenced herein. First, Operator asserts that the complainant incorrectly answered question number 8 on FCC Form 393 as it then existed because it included the rate for service on the basic tier, as well as for service on the CPS tier. Second, Operator asserts that the complainant incorrectly answered question number 9 because it included channels that are offered on the basic tier, as well as channels that are offered on the CPS tier. Operator's assertions do not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the man-

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Operator's price for the period after May 14, 1994 may be required to reflect the fact that Operator's price during the earlier period, which are used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] For example, Operator filed an amended FCC Form 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. Cable Operators' Rate Justification Filings, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

[12] See letter from Peter G. Wolfe, FCC, to Steven J. Horvitz, counsel for Paragon (Feb. 14, 1995); letter from Peter G. Wolfe, FCC, to Matthew Zinn, counsel for Paragon (Mar. 10, 1995); letter from Peter G. Wolfe, FCC, to Steven Horvitz, counsel for Paragon (Apr. 12, 1995); letter from Peter G. Wolfe, FCC, to Steven Horvitz, counsel for Paragon (Apr. 13, 1995).

date of the 1992 Cable Act. Because the complainant's response to question number 9 includes channels contained on the CPS tier and because the rates listed in answer number 8 include the rate for the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate and that it believed that rate was unreasonable.[13] We therefore find the complaint valid and deny Operator's Motion to Dismiss.

6. In its supplemental filing of July 11, 1994, Operator calculated a maximum permitted rate for the CPS tier of $7.18 per month (plus franchise fee). Upon review of this filing, we have found no apparent errors that would require a recalculation of this maximum permitted rate. However, Operator's actual monthly charge for its CPS tier was $7.22 (plus franchise fee). Thus, Operator has failed to demonstrate that the actual charge for its CPS tier was at or below the maximum permitted rate. We must therefore recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which Operator filed.[14] On its amended Form 393, Operator calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Operator used in justifying its rates, of 1.030.

7. Upon review of the record herein, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier price of $7.14 per month (plus franchise fee) for the period from November 8, 1993 to May 14, 1994.[15] However, we further determine that the total overcharge per subscriber is *de minimis*. Therefore, it would not serve the public interest to order a refund.

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the Operator's motion to dismiss the complaint referenced herein IS DENIED.

9. IT IS FURTHER ORDERED that the complaint against the cable programming service price charged by Operator in the areas referenced in the caption IS GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to $7.14 (plus franchise fee).[16]

11. IT IS FURTHER ORDERED that Operator shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[13] We note that in January 1994 the Commission released a revised Form 329 that omitted question 9.

[14] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[15] This finding is based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[16] We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Booth American Company CUID No.
D/B/A Blacksburg Cable TV, Inc. VA0014 (Blacksburg)

Benchmark Filing to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 24, 1995; Released: April 28, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the price Booth American Company, D/B/A Blacksburg Cable TV, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service price charged by Operator in the community referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.,

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable of New York City and Queens Inner Unity Cable Systems	CUID Nos. NY1280, NY1281, NY1340, NY1402
Petition for Stay of Bureau Action in Benchmark Rate Order DA 95-429	Brooklyn and Queens, NY

ORDER

Adopted: April 28, 1995; Released: May 1, 1995

By the Chief, Cable Services Bureau:

1. On April 6, 1995, Time Warner Cable of New York City and Queens Inner Unity Cable Systems (Time Warner) filed with the Commission a Petition for Stay of Enforcement Pending Reconsideration. The Cable Services Bureau (Bureau) released, on March 7, 1995, an order finding several errors in Time Warner's rate justification filing on FCC Form 393, and made adjustments that resulted in a lowering of Time Warner's maximum permitted rate to a level that produced refund liability.[1] The Bureau directed Time Warner to propose a refund plan, and to adjust its FCC Form 1200 and its current rates to reflect these findings. 47 C.F.R. §§ 76.922(b)(4)(C), 76.957. In addition to its petition for stay, Time Warner has filed a Petition for Reconsideration of the *New York Order*. Time Warner argues, in its petition for stay, that it will be irreparably harmed if the Bureau does not stay the enforcement of the *New York Order* pending the resolution of Time Warner's petition for reconsideration.

2. In its petition for stay, Time Warner asserts that it is likely to prevail on the merits in its reconsideration petition; that it will be irreparably harmed absent a stay; that others will not be harmed if a stay is granted; and that the public interest will be served by the grant of a stay. Time Warner's assertion of irreparable harm is based on the Commission's instruction to reduce CPS prices prospectively by some 66 cents per subscriber per month, and upon the likelihood that, should Time Warner prevail on the merits of its petition for reconsideration, these funds would be unrecoverable. Time Warner also notes that if a stay were granted and Time Warner did not prevail on reconsideration, refunds would be paid with accrued interest, at no harm to subscribers.

3. No party has opposed Time Warner's petition for stay. We find that Time Warner could suffer irreparable harm if it were required to comply with the requirements of the *New York Order* during the pendency of its petition for reconsideration, since it appears that expenditures made in such compliance could be unrecoverable. Because the equities argue for a stay of enforcement, and there is no harm to subscribers or to any other party from such a stay, we need not reach the question of the likelihood of Time Warner's success on the merits of the issues it raises on reconsideration. We will accordingly grant Time Warner's request for stay of the *New York Order* until such time as Time Warner's petition for reconsideration of that order is resolved.

4. Accordingly, IT IS ORDERED, pursuant to Sections 0.321, 1.41, and1.44(e) of the Commission's rules, 47 C.F.R. §§ 0.321, 1.41, and 1.44(e), that the Petition for Stay of Enforcement Pending Reconsideration filed by Time Warner Cable of New York City and Queens Inner Unity Cable Systems for CUID Nos. NY1280, NY1281, NY1340, and NY1402 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] Time Warner Cable of New York City, Memorandum Opinion and Order, DA 95-429 (Cab. Serv. Bur.), released March 7, 1995 (*New York Order*). The adjustments included modification of Time Warner's showings regarding channel counts, depreciation amounts, and an adjustment of the inflation factor.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTURY SOUTHWEST CABLE TELEVISION, SANTA MONICA, CALIFORNIA

Request for Stay
of Cable Services Bureau Order, DA 95-123

ORDER

Adopted: May 1, 1995; Released: May 3, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On August 18, 1994, Century Southwest Cable Television ("Century") filed with the Commission an appeal of the local rate order adopted by the City of Santa Monica, California ("City") on July 19, 1994.[1] In its local rate order, the City established Century's rates for basic tier service, associated equipment and installations.[2] As part of its decision setting Century's basic tier rates, the City found that the channels contained in Century's "Century Select" a la carte package should be included as regulated channels for purposes of the local rate order. The City ordered Century to make refunds or credit subscribers for all payments made in excess of the rates for basic service and equipment and installations set forth in the local rate order for the period of time between September 1, 1993 and July 14, 1994. The sole issue raised by Century in its appeal of the local rate order centered on the proper regulatory treatment of Century's a la carte package offering.

2. On January 31, 1995, the Cable Services Bureau ("Bureau") denied Century's appeal. *See In the Matter of Century Southwest Cable Television, Santa Monica, California,* DA 95-123 (Cab. Serv. Bur., released January 31, 1995) (*"Century Southwest Cable Television, Santa Monica, California"*). The Bureau held that the City's decision to treat the channels in the Century Select package as regulated channels was consistent with the Bureau's Letter of Inquiry ("LOI") Orders. In particular, the City's action was consistent with the Bureau's LOI Order involving Century Southwest Cable TV's Los Angeles and Beverly Hills systems.[3]

3. On March 2, 1995, Century filed both an Application for Review of the Bureau's decision in *Century Southwest Cable Television, Santa Monica, California,* as well as an Emergency Petition for Stay of the Bureau's decision. The City filed an opposition to Century's Emergency Petition for Stay on March 9, 1995.[4] In its stay request, Century submits that it satisfies the legal standard for the granting of a stay and is, therefore, entitled to a stay of the Bureau's decision.[5]

II. STANDARD OF REVIEW

4. The Commission evaluates petitions for stay under well settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors the granting of a stay.[6] As discussed below, resolution of this stay petition centers primarily on the strength of Century's argument regarding the third prong of this test.

III. DISCUSSION

5. The Commission's rules permit operators to implement refunds using either of the following methods: (1) by returning overcharges directly to those subscribers who actually paid the overcharges; or (2) by means of a prospective percentage reduction in the rates for the basic service tier or associated equipment for current subscribers via a specifically identified, one-time credit.[7] Thus, the Commission's rules are structured so that individuals who were actually overcharged might not receive refunds in the future. Thus, a delay in the implementation of the refunds owed by Century will not harm any interested party, since if Century must implement refunds, it can choose to do so by way of credits to the then-current class of subscribers.

6. A stay of the Bureau's Order in *Century Southwest Cable Television, Santa Monica, California* would prevent Century from being subjected to the irreparable economic harm it could face by issuing refunds to subscribers that it may not later recoup. Accordingly, given our findings herein, we will grant Century's request that the Bureau's

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[1] Century also filed an Emergency Petition for Stay of the City's local rate order on August 18, 1994. Century withdrew this stay request on August 23, 1994.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] *See Century Southwest Cable Television, Beverly Hills and Los Angeles, California,* LOI 93-17, DA 94-1553 (Cab. Serv. Bur., released December 22, 1994).

[4] On March 14, 1995, Century filed a Petition for Waiver of the Commission's Rules of Practice, in which it requested that the Commission waive §1.45(d) of its rules and consider Century's Limited Reply in Support of Emergency Petition for Stay which it attached to its waiver request. Century's Petition for Waiver of the Commission's Rules is denied, however, we note that the arguments contained in Century's Limited Reply in Support of Emergency Petition for Stay would not have changed the decision as set forth in this Order.

[5] *See* paragraph 4, *infra.*

[6] *See* Wisconsin Gas Co. v. FERC, 758 F. 2d 669, 673-74 (D.C. Cir. 1985) (per curiam); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

[7] 47 C.F.R. §76.942(d).

Order in *Century Southwest Cable Television, Santa Monica, California* be stayed pending full review of Century's Application for Review. During the period of this stay, Century must deposit in an interest-bearing escrow account the total amount of money that the City has ordered Century to refund to its customers. Alternatively, Century may elect to post a bond for the benefit of the City. The amount of the bond shall be the total amount of money that the City has ordered Century to refund to its customers, plus interest on that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if Century is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the City, on behalf of Century's subscribers.

IV. ORDERING CLAUSES

7. Accordingly,IT IS ORDERED that the Emergency Petition for Stay filed by Century is GRANTED pending the resolution of Century's Application for Review on the merits.

8. IT IS FURTHER ORDERED that the total amount of money that the City has ordered Century to refund to its customers SHALL BE PLACED by Century in an interest-bearing escrow account, OR SHALL BE SECURED by the posting of a bond for the benefit of the City for the total amount of money that the City has ordered Century to refund to its customers, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of Century's compliance with this Order shall be filed with the Commission within thirty (30) days of the release of this Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate for tax refunds and additional tax payments.

9. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Time Warner Cable — CUID Nos. WI0319 (Cudahy)
WI0321 (Franklin)

Benchmark Filings to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 27, 1995; **Released: May 4, 1995**

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider complaints about the prices Time Warner Cable ("Operator") was charging for its cable programming service ("CPS") tier in the communities referenced above. Operator has chosen to attempt to justify its prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operator's prices only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the prices after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS prices are justified by its benchmark filings because these prices are equal to the maximum permitted charges. Upon review, we have found no apparent errors that would result in Operator's actual CPS prices exceeding its maximum permitted CPS prices.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the cable programming service prices charged by Operator in the communities referenced above ARE DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

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[1] The findings in this Order do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS prices under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

V Cable, Inc. CUID No. OH0968
Solon, Ohio

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 4, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Here we consider a complaint about the price V Cable,Inc. d/b/a Cablevision ("Cablevision") was charging for its cable programming service ("CPS") tier in Solon, Ohio, CUID No. OH0968. Cablevision has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Cablevision's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

II. PROCEDURAL MATTERS

4. The first complete and timely CPS complaint in Solon, Ohio, CUID No. OH0968, was completed and served on Cablevision on November 17, 1993 and received by the Commission on November 22, 1993.

5. Cablevision filed its FCC Form 393 on December 27, 1993. Cablevision amended its justification on February 17, 1995, and April 13, 1995, in response to Commission letters which requested further clarification of Cablevision's amended showing.[11]

III. BACKGROUND

6. Cablevision restructured its rates in an effort to comply with the Commission's Rules on September 1, 1993. In October 1993, Cablevision changed its channel line-up on Channel 37 by deleting HSN II, a satellite channel on the CPS tier, and adding WQHS, a non-satellite channel on the basic tier. On January 1, 1994, Cablevision again changed its channel line-up by moving Channel 17, a satellite channel on the CPS tier, to the basic tier. These changes in Cablevision's channel line-up were unaccompanied by any change in Cablevision's prices for its basic and CPS tiers. Cablevision completed Part II of Form 393 using its channel line-up after the October 1993 change. In Part I of Form 393, Cablevision performed alternative calculations using its number of channels as of September 1, 1993, and after the October 1993 line-up change.

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cablevision has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cablevision implemented its CPS price under the new regulations. *See* para. 3, *infra*. Further, to the extent that the price as of March 31, 1994 is found to be excessive, a reduction in Cablevision's price for the period after May 14, 1994 may be required to reflect the fact that Cablevision's price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. *See* 47 C.F.R. § 76.922(b)(4)(C).

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] Letter from Peter G. Wolfe, FCC, to Chad G. Hume, Cablevision (Feb. 13, 1995); letter from Peter G. Wolfe, FCC, to Chad G. Hume, Cablevision (Mar. 7, 1995).

IV. DISCUSSION

7. Cablevision acknowledges that its CPS price is higher than the maximum permitted price if Form 393 is calculated using the number of channels Cablevision offered as of November 1993.[12] Thus, Cablevision has failed to demonstrate that its price for the CPS tier was not unreasonable. Furthermore, upon review we have found that Cablevision has not correctly calculated its maximum permitted price as of the initial date of regulation, and it is therefore appropriate to make the following adjustment to Cablevision's calculations on Form 393:

> In its Form 393 filing, Cablevision calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of December 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Cablevision's use of December 1993 as the date through which it calculated the inflation adjustment is impermissible. Cablevision was required to file a justification of its CPS price for the Solon franchise area no later than December 17, 1993.[13] If Cablevision had filed its justification in a timely fashion, the instructions to Form 393 would have required it to calculate the inflation adjustment only through November 1993.[14] We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on which Cablevision should have filed.[15] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.032 as the Inflation Adjustment Factor through November 1993, the base date Cablevision should have used in justifying its rate.

8. This adjustment has the effect of yielding the maximum permitted monthly CPS tier price for Solon, Ohio, CUID No. OH0968, as of the initial date of regulation set forth in Appendix A.

9. As described in paragraph 6, *supra*, on January 1, 1994, Cablevision moved Channel 17 from the CPS tier to the basic tier. Cablevision thus increased the rate charged for its service by reducing the number of channels available on the CPS tier without a consequent reduction in price. Cablevision failed to notify the Commission of the rate change and submit a revised rate justification as required by the instructions to Form 393.[16] To determine Cablevision's subsequent permitted per channel charge as of January 1, 1994, and thus Cablevision's maximum permitted price, we rely on the Commission's rules then in effect[17] and therefore reduce the number of channels on the CPS tier on Form 393, Part I effective January 1, 1994 from 23 to 22. This adjustment has been reflected in Appendix A for the period after December 31, 1993.

V. CONCLUSIONS

10. Upon review of the record herein, we conclude that Cablevision's showing supports the maximum CPS tier prices set forth in Appendix A (plus franchise fee) for the periods set forth in Appendix A.[18] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. We further conclude that Cablevision must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that Cablevision's price as of March 31, 1994 was unreasonable. We reserve the right to make further adjustments to Cablevision's price for the period after May 14, 1994, upon completion of our review of Cablevision's FCC Form 1200 rate filing.

12. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint filed on November 22, 1993 against the cable programming service price charged by V Cable, Inc. d/b/a Cablevision in Solon, Ohio, CUID No. OH0968 IS GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED that the benchmark filing submitted by V Cable, Inc. d/b/a Cablevision with respect to Solon, Ohio, CUID No. OH0968, for the periods set forth in Appendix A justifies the maximum prices set forth in Appendix A (plus franchise fee) for V Cable, Inc. d/b/a Cablevision's cable programming service tier.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that V Cable, Inc. d/b/a Cablevision shall refund to subscribers that portion of the amounts paid for cable programming

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[12] Cablevision asserts that when it initially restructured its prices on September 1, 1993, it had one additional CPS channel and one fewer basic tier channel. If Cablevision had computed Part I of Form 393 based on the number of channels offered on September 1, 1993, its price would have been equal to or lower than the maximum permitted per-channel charge as calculated in the filing. However, as recognized by Cablevision, Form 393 must be completed using the number of channels offered by the operator as of the initial date of regulation.

[13] 47 C.F.R. § 76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

[14] FCC Form 393, page 11, instructions for line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form"). We note that, in accordance with this instruction, Cablevision's use of December 1993 as the base date is impermissible even for the date that it actually untimely filed.

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] 47 C.F.R. § 76.958. General Instruction 1 (on page 2) to FCC Form 393, clearly requires that while there is a complaint regarding CPS rates pending before the Commission, the cable operator must inform the Commission of any CPS rate increase and submit a revised Form 393.

[17] 47 C.F.R. § 76.922(c) (1993) (amended, effective May 15, 1994).

[18] This finding is based solely on the representations of Cablevision listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 through 9, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

service for the periods set forth in Appendix A[19] to May 14, 1994 which exceeded the maximum prices set forth in Appendix A (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED that V Cable, Inc. d/b/a Cablevision shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval thereof.

16. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that V Cable Inc. d/b/a Cablevision shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Solon, Ohio, CUID No. OH0968, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price set forth in Appendix A (plus franchise fee).

17. IT IS FURTHER ORDERED that V Cable, Inc. d/b/a Cablevision shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

Actual Rate	$13.83
First Period Maximum Rate	$12.07 for 11/22/93-12/31/93
Second Period Maximum Rate	$11.55 for 1/1/94-5/14/94

[19] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b). Consequently, the periods set forth in Appendix A begin with the date of the filing of the first valid complaint.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Paragon Cable CUID No. TX0604 (Coppell)

Benchmark Filing to Justify Cable
Programming Service Rate

MEMORANDUM OPINION AND ORDER

Adopted: April 28, 1995; Released: May 4, 1995

By the Chief, Financial Analysis and Compliance Division, Cable Services Bureau:

1. Here we consider a complaint about the price Paragon Cable ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is equal to the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 24, 1995

Released: April 28, 1995

W. Robert Felder
President, Grassroots
Cable Systems
Industrial Drive
Exeter Corporate Park
P.O Box 280
Exeter, NH 03833

IN REPLY REFER TO:
DA 95-914

Dear Mr. Felder:

This letter is in reference to the letter you filed on April 19, 1995 with respect to a complaint filed February 22, 1994, against the price Grassroots Cable Systems ("Grassroots") was charging for cable programming service in Middleton, New Hampshire, CUID No. NH0180. In that letter, you state that Grassroots's Middleton, New Hampshire system has 388 subscribers. Based on the information you have provided, it appears that the Middleton system qualifies as a "small system" pursuant to 47 C.F.R. § 76.901(c), and was therefore exempt from rate regulation until May 15, 1994.

We will rule at a later date on Grassroots's justification under the Commission's revised rate regulations of its cable programming service rates in Middleton beginning May 15, 1994. At that time, we will also consider Grassroots's argument that the complaint is deficient on its face.

Should you have any questions regarding this matter, please contact Peter G. Wolfe at (202) 739-0783.

Sincerely,

JoAnn Lucanik
Chief, Financial Analysis and Compliance Division
Cable Services Bureau

cc: Frederick McConnell
Town of Middleton

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter Of

CUID No. OH0248 (Sandusky, OH)
Erie County Cablevision, Inc.

Benchmark Filing to Justify Cable
Programming Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1995 Released: April 13, 1995

By the Deputy Chief, Cable Services Bureau:

1. Here we consider a complaint about the price Erie County Cablevision, Inc. ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a complete and timely complaint. The filing of a complete and timely complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with complete and timely CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent the operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which the operator implemented its CPS price under the new regulations. *See* para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

4. Operator asserts that its monthly CPS price is justified by its benchmark filing because this price is less than the maximum permitted charge. Upon review, we have found no apparent errors that would result in Operator's actual CPS price exceeding its maximum permitted CPS price.[11]

5. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service price charged by Operator in the community referenced above IS DENIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

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[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189 n.195.

[11] This finding is based solely on the representations of the operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CUID Nos. NH0027 (Charlestown)
First Carolina Cable TV, L.P. NH0149 (Grantham)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1995 Released: April 12, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaints filed against Operator, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in these communities. The complaints therefore do not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed prior to May 15, 1994, against the cable programming service prices charged by Operator in the communities referenced in the caption ARE DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CUID Nos. SC0473 (Dovesville)
Friendship Cable TX0206 (Beach City)

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1995 Released: April 12, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the prices that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the communities designated above on the ground that the complaints concern rates that are outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaints filed against Operator, while asserting that they challenge CPS rates, challenge only rates for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in these communities. The complaints therefore do not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed prior to May 15, 1994, against the cable programming service prices charged by Operator in the communities referenced in the caption ARE DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Public Notice

CORRECTED*

Released: April 3, 1995

COMMISSION ANNOUNCES ENFORCEMENT POLICY REGARDING TELEPHONE COMPANY OWNERSHIP OF CABLE TELEVISION SYSTEMS

Section 613(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 533(b), generally bans a telephone company from owning a cable television system that operates within the telephone company's local service area. The United States Courts of Appeals for the Fourth and Ninth Circuits have found the statutory ban unconstitutional, and several United States District Courts have enjoined the Commission from enforcing the ban. In light of those decisions, pending the outcome of any further judicial review, the Commission will not enforce the cable television/telephone company cross-ownership restriction against: (1) any telephone companies that are parties to cases in which the Commission has been enjoined from enforcing Section 613(b) (including NYNEX, Ameritech, BellSouth, Bell Atlantic, US WEST, Southwestern Bell, GTE, and most members of United States Telephone Association, Organization for the Protection and Advancement of Small Telephone Companies and National Telephone Cooperative Association); and (2) telephone companies, to the extent they operate in the 4th and 9th Circuits, regardless of their status as parties to any suit. With respect to other telephone companies, the Commission will continue to enforce the ban.

A telephone company against whom the Commission is not enforcing the cable television/telephone company cross-ownership ban need not obtain a waiver of the ban from the Commission in order to construct or acquire a cable television system within its local service area. A telephone company must, however, continue to obtain from the Commission a certificate of public convenience and necessity under Section 214 of the Communications Act before constructing or acquiring a cable television system within its local service area. See 47 C.F.R. §§ 63.01, 63.08, 63.09. See generally General Telephone Company of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971). Any such certificates of public convenience and necessity that are granted will be conditioned on the outcome of the Fourth Further Notice of Proposed Rulemaking, CC Docket No. 87-266 (released January 20, 1995).

If the acquisition of a cable television system by a telephone company against whom the Commission is not applying the cable television/telephone company cross-ownership ban also involves applications for assignment or transfer of control of Cable Antenna Relay Service licenses, action on those applications will not be taken until after Section 214 authority is granted. See 47 C.F.R. § 78.13.

By the Chief, Common Carrier Bureau, Chief, Cable Services Bureau, and the General Counsel

For further information contact: Jim Keegan at (202)634-1867 (Common Carrier Bureau), Larry Walke at (202)416-0800 (Cable Services Bureau) or Sonja Rifkin at (202)418-1720 (Office of General Counsel).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of

File Nos. 3-DSS-AMEND-93
4-DSS-AMEND-95

AMSC SUBSIDIARY CORPORATION

For Authority to Construct, Launch
and Operate AMSC-1

ORDER AND AUTHORIZATION

Adopted: April 3, 1995 Released: April 4, 1995

By the Chief, International Bureau:

1. AMSC Subsidiary Corporation (AMSC) has filed two requests relating to AMSC-1, the first of three satellites comprising its Mobile Satellite Service (MSS) system.[1] In these requests, AMSC proposes to eliminate use of the 11/13 GHz band for telemetry, tracking and control (TT&C) operations and to use only the 12/14 GHz band for those purposes.[2] More specifically, AMSC seeks authority to use the frequencies 11700.5 MHz, 11701.0 MHz and 14499.5 MHz for TT&C operations during transfer orbit maneuvers, and 11700.5 MHz, 11701.0 MHz, 14000.5 MHz and 14499.5 MHz for TT&C operations when AMSC-1 reaches its proper orbital location.[3] No one opposes the AMSC requests, and we grant them in this order.

2. The Commission previously authorized AMSC to use the 12/14 GHz band for TT&C operations only during AMSC-1's transfer orbit maneuver.[4] Although TT&C operations are often authorized in the same bands in which the licensee operates its gateway service, which in this case would be the 11/13 GHz bands,[5] we granted AMSC's earlier request after observing that there are no world-wide TT&C facilities that operate in the 11/13 GHz band. AMSC now seeks an amendment to its earlier authorization to use slightly different frequencies in the 12/14 GHz bands for TT&C operations during the transfer orbit maneuver, viz., 11700.5 MHz, 11701.0 MHz, and 14499.5 MHz. AMSC also seeks authority to conduct TT&C operations on these frequencies and on 14000.5 MHz when AMSC-1 reaches its proper

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[1] See Memorandum Opinion, Order and Authorization (Licensing Order), 4 F.C.C. Rcd 6041 (1989), rev'd in part, Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 (D.C. Cir. 1991); see also Final Decision on Remand, 7 F.C.C. Rcd 266 (1992) (reaffirming grant of MSS license to MSS) aff'd, Aeronautical Radio, Inc. v. FCC, 983 F.2d 275 (1993). See also Order and Authorization, File No. 13-DSS-AL-91(3) (March 22, 1991) (granting assignment of MSS authorization from American Mobile Satellite Corporation to AMSC Subsidiary Corporation).

[2] In this Order and Authorization, we use the term "11/13 GHz band" to refer to the frequencies 10.7-11.7 and 12.75-13.25 GHz, and the term "12/14 GHz band" to refer to frequency bands 11.7-12.2 and 14.0-14.5 GHz. Both the 11/13 and 12/14 GHz bands are allocated domestically to the Fixed Satellite Service (FSS).

[3] The transfer orbit maneuver is used to place the satellite at its on-orbit location, i.e., its designated geostationary orbit location, after the satellite is separated from the launch vehicle. The maneuver typically requires worldwide tracking facilities, since during the maneuver the satellite will be located at a wide range of positions above the surface of the earth.

[4] See Memorandum Opinion & Order, 8 F.C.C. Rcd 4040 (1993). The specific frequencies authorized are 12197.75 MHz, 12195.25 MHz, and 14003.5 MHz.

[5] These bands are the authorized "feeder link" bands for AMSC-1. Feeder links are radio links between an earth station at a fixed location and a satellite, and are used in an MSS system to connect one mobile terminal with another, and to connect the system to terrestrial communication networks. They are distinct from AMSC's "service links," which are the radio links between the satellite and either mobile earth terminals or aeronautical mobile earth terminals. AMSC-1's service links are at 1545-1559/1646.5-1660.5 MHz.

orbital on-station location.[6]

3. AMSC states that a grant of its request will allow it to consolidate both its transfer orbit maneuver and on-orbit TT&C operations in the 12/14 GHz band, thereby reducing the duplication of the TT&C packages aboard the spacecraft, which would reduce the weight of the satellite. This allows more station-keeping fuel to be loaded aboard the satellite, and thereby increases the satellite's life.[7] In addition, AMSC asserts, it will realize substantial savings in the satellite's construction costs. Further, AMSC notes that it would have the option of leasing ground segment TT&C services from an established domestic fixed satellite operator that already is providing such services in the 12/14 GHz bands, thereby potentially further reducing its overall system costs. AMSC adds that its TT&C operations at 12/14 GHZ will cause no harmful interference to any existing satellite operations. In particular, AMSC states that GTE Spacenet, which currently operates a satellite at 101 degrees W.L., the orbital location from which AMSC-1 would operate, "has indicated th[is] [AMSC-1] modification will not cause harmful interference to its current satellite operations. Furthermore, AMSC and GTE Spacenet have an understanding that they will attempt to resolve any future problems in that regard." Application at 5-6.[8]

4. AMSC also submits that any future satellites authorized to operate in the 12/14 GHz band are unlikely to be affected by AMSC-1's operations, even if the future satellite were located at 101 degrees W.L. AMSC submits a technical analysis examining whether any of the currently deployed domestic FSS satellites, if moved to 101 degrees W.L., would potentially receive interference from AMSC-1's proposed operations. AMSC concludes that only one satellite, SBS-5, might possibly be adversely affected, and that it is unlikely that SBS-5 will ever be relocated to 101 degrees W.L..[9] AMSC also states that if a future assignee of the 101 degree W.L. orbital location receives unacceptable interference from AMSC-1, AMSC could relocate to either 100 or 102 degrees W.L. Moreover, AMSC adds, all extant domsats could be located at 99, 101,or 103 degrees W.L. without receiving or causing interference from or to AMSC-1 located at either 100 or 102 degrees W.L.

5. AMSC also notes that it is increasingly common to use hybrid domestic fixed satellites which operate in both the 4/6 GHz and 12/14 GHz bands, and generally conduct TT&C only within the 4/6 GHz band. AMSC states that a continuation of this trend will leave the edges of the 12/14 GHz band, where it proposes to locate its TT&C operations, increasingly unused. This, AMSC concludes, adds further to the spectrum efficiency of its proposal and helps assure that the requested authorization will not interfere with future 12/14 GHz band service.

6. With respect to its request for revised frequencies to use during the transfer orbit

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[6] AMSC was granted a waiver of Section 319(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 319(d), to construct the AMSC-1 satellite at its own risk in conformance with this request. See Order, 23-DSS-MISC-92 (May 27, 1993).

[7] Station-keeping fuel is used to maintain or adjust the position of a satellite in its orbit.

[8] Subsequently, control of GTE Spacenet was transferred from GTE Corporation to GE American Communications, Inc. See Contel Corporation, 9 F.C.C. Rcd 5775 (1994).

[9] SBS-5 is licensed to Hughes Communications Galaxy, Inc., and is operating at 123 degrees W.L. AMSC states that it is unlikely SBS-5 will ever be relocated to 101 degrees W.L. because SBS-5 is not a hybrid satellite, and 101 degrees W.L. is assigned by the Commission for use by hybrid satellites, which normally operate in both C-band (4/6 GHz) and Ku-band (12/14 GHz). AMSC concludes, therefore, that its "use of 12/14 GHz . . . is consistent with the Commission's policy of promoting fungibility in orbital locations." Application at 4.

maneuver, AMSC states that it will coordinate with other satellite operators as necessary to prevent harmful interference to their systems. Further, thirty days prior to launch of AMSC-1, AMSC states that it will notify operators of the satellites that AMSC-1 will pass during the five-day transfer orbit phase. It will also advise operators that AMSC-1 and its ground facilities will not radiate when the satellite is within one degree of another satellite.

7. We grant AMSC's requests. By consolidating TT&C operations in the 12/14 GHz b[illegible] AMSC will eliminate the need for 11/13 GHz TT&C equipment, and will be able to lease ground segment TT&C functions from existing operators. These benefits will be reflected in lower costs to customers. Furthermore, AMSC has demonstrated that grant of its proposal would not result in interference to current fixed satellite service operations in the 12/14 GHz band, as evidenced by its agreement with GTE Spacenet. Consequently, we find that a grant of AMSC's request will serve the public interest pursuant to Sections 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 309 and 319. However, we are concerned that AMSC's use of the 12/14 GHz bands for TT&C could affect future fixed satellite service operations at the 101° W.L. orbital location. Therefore, we condition grant of this authorization on AMSC coordinating its TT&C operations with any 12/14 GHz satellite authorized to occupy orbital location 101 degrees W.L., and with the understanding that we will require AMSC to relocate AMSC-1 if AMSC is unsuccessful in completing coordination with these other U.S. satellite licensees.

Ordering Clauses

8. Accordingly, IT IS ORDERED that, pursuant to Section 0.261 on delegation of authority, 47 C.F.R. § 0.261, application File Nos. 3-DSS-AMEND-93 and 4-DSS-AMEND-95 ARE GRANTED, and AMSC is permitted to use the frequencies 11700.5 MHz, 11701.0 MHz and 14499.5 MHz during its transfer orbit maneuvers. AMSC is also permitted to use the frequencies 11700.5 MHz, 11701.0 MHz, 14000.5 MHz and 14499.5 MHz for telemetry, tracking, and control functions from its proper on-station orbital location, 101 degrees, W.L., provided that AMSC successfully coordinates its TT&C operations with licensees of satellites at 101 degrees W.L. operating in the 12/14 GHz bands. If a coordination agreement cannot be reached, AMSC-1 will be required to relocate to another orbital location.

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Inter-Category Sharing of Private Mobile Radio Frequencies in the 806-821/851-866 MHz bands.

ORDER

Adopted: April 5, 1995 **Released: April 5, 1995**

By the Chief, Wireless Telecommunications Bureau:

1. On March 1, 1995, the Wireless Telecommunications Bureau received a stay request from the Association of Public-Safety Communications Officials, Inc. (APCO) with respect to inter-category sharing by non-public safety entities in the 800 MHz Public Safety Category channels.[1] The Industrial Telecommunications Association, Inc. (ITA or Opponent) opposes this request.[2] For the reasons stated below, we have decided to place a freeze on the filing of new applications for inter-category sharing on all private mobile radio service (PMRS) frequencies in the 806-821/851-866 MHz bands.[3]

2. APCO has requested that the Commission place an immediate hold on inter-category sharing by non-public safety entities in the 800 MHz Public Safety Category channels.[4] This category consists of 70 channels available for licensing by public safety entities.[5] The Commission's Rules, however, currently allow a Business or Industrial/Land Transportation (I/LT) entity to obtain a license in the Public Safety Category if certain criteria are met. Inter-service sharing is permitted if the channel being sought is currently unoccupied and if there are no channels available in the applicant's "home" category.[6]

3. Currently, 800 MHz SMR licensees may be licensed on the 150 channels in the General Category[7] or licensed under our inter-category sharing rules on 100 channels in the I/LT and

[1] Letter from Robert M. Gurss, Attorney for the Association of Public-Safety Communications Officials - International, Inc., to Robert H. McNamara, Acting Chief, Private Radio Division, Wireless Telecommunications Bureau (Mar. 1, 1995)(APCO Request). APCO is the frequency coordinator for the Public Safety frequencies.

[2] Letter from Cynthia T. Chappell, Executive Vice President and Chief Operating Officer, ITA, to Robert H. McNamara, Acting Chief, Private Radio Division, Wireless Telecommunications Bureau (Mar. 30, 1995)(ITA Opposition). ITA (formerly the Special Industrial Radio Service Association, Inc. (SIRSA)) is the frequency coordinator for Industrial/Land Transportation frequencies.

[3] 47 C.F.R. § 90.621(g)(1),(2). See also 47 C.F.R. § 90.619(a)(1),(3),(4), which provides that certain channels in the 806-821/851-866 MHz band are also available to eligible applicants in the Public Safety, Industrial/Land Transportation, and Business categories in areas within 110 kilometers of the U.S./Mexico border. See also 47 C.F.R. § 90.619(b)(8) Tables 9, 10, 11; (b)(9) Tables 13, 14, 15; (b)(10) Tables 17, 18, 19; and (b)(11) Tables 21, 22, 23, which provides that certain channels in the 806-821/851-866 MHz band also are available to eligible applicants in the Public Safety, Industrial/Land Transportation, and Business categories in areas within 140 kilometers of the U.S./Canada border. A stay also will be placed on the filing of new applications for inter-category sharing of these frequencies.

[4] APCO Request at 1.

[5] 47 C.F.R. § 90.617(a). See supra note 3 for a reference to the 800 MHz Public Safety Category channels in the border areas.

[6] 47 C.F.R. § 90.621(g)(1).

[7] 47 C.F.R. § 90.615(a).

Business Categories (known as "Pool Channels.")[8] There has been a steep rise in SMR demand for out-of-category assignments because the Commission imposed a freeze on the acceptance of 800 MHz applications on 280 SMR category channels (except for applications for transfer or assignment of existing SMR facilities).[9] This, in turn, has had a domino effect with other PMRS applicants seeking out-of-category license assignments in the 806-821/851-866 MHz bands, specifically Business and I/LT applicants seeking inter-category sharing of the Public Safety category channels. If the "Pool Channels" remain available to SMR licenses,[10] and not subject to auctions, demand for out-of-category assignments by SMR applicants seeking to avoid auctions may render these channels unavailable to other Part 90 services that need them and are currently eligible for them.[11] In view of this situation, the Commission has undertaken a rule making proceeding in which it is considering whether the availability of inter-category sharing channels to SMR licensees should be limited and also whether other Part 90 services should be restricted from future eligibility for licenses on SMR Category channels.[12]

4. In its spectrum allocation deliberations, the Commission is specifically considering whether to make a clear demarcation between the allocation of spectrum for SMR and for other Part 90 services in order to eliminate the risk of SMR encroachment on non-auctionable spectrum allocated for PMRS purposes.[13] Included in the PMRS category are public safety radio services which include the Local Government, Police, Fire, Highway Maintenance, Forestry-Conservation and Emergency Medical Radio Services.[14] It is the continued availability to the public service community of the frequencies allocated to these services which is of concern to APCO.[15] Congress also is concerned with the adequacy of spectrum to meet the communications needs of public service agencies.

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[8] 47 C.F.R. § 90.621(g)(2),(3). The above number of channels are for use only in non-border areas. In the border areas, the number of channels and the actual frequencies differ. For example, there are 120 such channels in the U.S./Mexico border area, 120 channels in Regions 1, 4, 5, and 6, 70 channels in Region 2, 170 channels in Region 3, and 240 channels in Regions 7 and 8.

[9] See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988, 8167 (1994).

[10] This can occur only as long as the freeze on SMR applications continues. See 47 C.F.R. § 90.621(g)(2) which provides that channels in the I/LT and Business categories will be available to fully-loaded SMR systems if no SMRS category frequencies are available.

[11] Pursuant to authority provided by the Omnibus Reconciliation Act of 1933, Pub. L. Mo. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993), the Commission intends to employ auctions to choose among mutually exclusive applicants for Specialized Mobile Radio (SMR) systems that provide interconnected service (classified as commercial mobile radio licenses). SMR licenses for systems that do not provide interconnection are classified as PMRS and, consequently, are not currently subject to auction.

[12] See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band and Implementation of Section 309(j) of the Communications Act, PR Docket No. 93-144 and PP Docket No. 93-253, Further Notice of Proposed Rule Making, FCC 94-271, 59 Fed. Reg. 60111, paras. 51-54 (November 22, 1994).

[13] Id. at para. 53.

[14] See Subpart B of Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.15 through 90.27.

[15] APCO Request at 2.

In response to a legislative requirement, the Commission has issued a report of current and future spectrum needs of state and local government public safety agencies.[16] The Commission is continuing to elicit more information from public safety agencies and other interested parties in order to develop specific steps to ensure that adequate frequencies are made available to public safety licensees.[17]

5. As noted by APCO, there has been a substantial increase in 800 MHz SMR applications on all the 150 General Category channels, as well as on an inter-category basis on the 800 MHz Business and I/LT categories.[18] Because of the pressure placed on the Business and I/LT categories by the SMR applications, there has been a dramatic increase in the number of Business and I/LT entities filing applications for inter-category sharing to use Public Safety channels in the 806-821/851-866 MHz bands. In fact, as of February 15, 1995, non-public safety entities have sought frequency coordination for approximately 300 license applications on 70 Public Safety Pool channels.

6. ITA opposes APCO's request asserting that it is a " . . . cavalier approach to elimination of a long-standing and beneficial rule . . . ."[19] In fact, ITA submits that public safety entities themselves benefit from the inter-category rules.[20] ITA further contends that the stay request is merely a reiteration of APCO's long-standing objection to the inter-category sharing rules[21] that have played a critical role in promoting efficient use of the 800 MHz channels for all eligible entities.[22] In ITA's view, current rules already provide a degree of protection to public safety entities,[23] and it would be contrary to the public interest to limit, in any way, the compelling public benefits that result from inter-category sharing.[24]

7. We believe that the current situation warrants a freeze on new applications for inter-category sharing of all PMRS frequencies in the 806-821/851-866 MHz band.[25] With regard to Public Safety, although these frequencies are fully occupied in, and near, most metropolitan areas and therefore are not available for inter-category sharing, there are some channels that remain available in less populated, but rapidly growing parts of the country. Public Safety agencies view these channels as resources to meet many of their future radio spectrum needs.[26] Other PMRS licensees, such as those in the Business and I/LT categories noted by ITA, also rely on their channels to meet communications needs. Unless we immediately freeze inter-category sharing of the PMRS frequencies in the 800 MHz band, the successful resolution of the spectrum allocation issues raised in PR Docket No. 93-144 and by the

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[16] Report and Plan of the Federal Communications Commission Meeting State and Local Government Public Safety Agency Spectrum Needs Through The Year 2010, FCC 95-55 (February 9, 1995).

[17] Id. at 7-8.

[18] APCO Request at 1.

[19] ITA Opposition at 1.

[20] ITA Opposition at 3.

[21] ITA Opposition at 1.

[22] ITA Opposition at 4.

[23] ITA Opposition at 3.

[24] ITA Opposition at 4.

[25] See Public Notice, Freeze on the Filing of MDS/MMDS Applications (Mimeo 22702, dated April 15, 1992), and Public Notice, MDS/MMDS Applications Filing Freeze (Mimeo 34165, dated July 28, 1993).

[26] APCO Request at 2.

public safety community could be compromised.[27]

8. Freezing acceptance of new inter-category sharing applications does not eliminate, as alleged by ITA, the inter-category rules. This temporary action merely allows for resolution of the Part 90 spectrum allocation issues in the appropriate rule making proceeding.[28] In fact, ITA has filed comments, and thus participated, in that proceeding. Whether the inter-category sharing rules adopted in 1982[29] continue to serve the public interest must be addressed in the context of the Commission's new regulatory structure developed more than a decade later.

9. Accordingly, IT IS ORDERED that the Request for Stay filed by APCO **IS GRANTED** to the extent indicated and acceptance of applications for inter-category sharing of frequencies allocated to the Public Safety, Industrial/Land Transportation, and Business Services **IS SUSPENDED** effective April 5, 1995.[30] Applications filed prior to April 5, 1995, will be processed.

10. For Further Information Contact Freda Lippert Thyden, Wireless Telecommunications Bureau, (202) 418-0627.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney
Chief, Wireless Telecommunications Bureau

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[27] As noted above, these issues regarding PMRS eligibles generally, and Public Service agencies specifically, were raised in PR Docket No. 93-144 and by a Congressional request, respectively. See supra paras. 3, 4.

[28] See supra para. 3.

[29] See Second Report and Order, PR Docket No. 79-191, 90 FCC 2d 1281 (1982).

[30] The imposition of this freeze is procedural in nature and therefore is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA). See Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963). Furthermore, good cause exists for noncompliance with these APA requirements. Adherence to the notice and comment and effective date requirements in this matter would be contrary to the public interest because compliance would undercut the purposes of the freeze.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CUID No. NH0236(Sanbornton)

Community TV Corp.

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1995 Released: April 12, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only the rate for equipment used to receive the basic service tier, not for CPS. In particular, the record shows that the complainant challenged only the additional outlet charge. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CUID No. MN0549 (Chisago City)
Triax Midwest Associates, L.P.

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1995 Released: April 12, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss a complaint against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaint concerns a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaint filed against Operator, while asserting that it challenges a CPS rate, challenges only the rate for equipment used to receive the basic service tier, not for CPS. In particular, the record shows that the complainant challenged only an additional outlet charge. The complaint therefore does not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaint filed prior to May 15, 1994, against the cable programming service price charged by Operator in the community referenced in the caption IS DISMISSED.

3. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

CUID Nos. VA0019 (Woodbridge)
Columbia Cable of Virginia

Order Denying Jurisdiction

MEMORANDUM OPINION AND ORDER

Adopted: April 10, 1995 Released: April 12, 1995

By the Deputy Chief, Cable Services Bureau:

1. In this Order we dismiss complaints against the price that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community designated above on the ground that the complaints concern a rate that is outside the jurisdiction and authority of this Commission. The Commission regulates rates for CPS only, and then only upon filing of a valid complaint.[1] Our review reveals that the complaints filed against Operator, while asserting that they challenge a CPS rate, challenge only a rate for basic service, not for CPS. In particular, the record shows that Operator offered only a basic tier of service, and not a CPS tier, in this community. The complaints therefore do not trigger the Commission's jurisdiction.

2. Accordingly, IT IS ORDERED, pursuant to Section 623(a)(2)(A) and (B) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(a)(2)(A) and (B), that the complaints filed prior to May 15, 1994, against the cable programming service price charged by Operator in the community referenced in the caption ARE DISMISSED.

[1] *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460, Section 623, 47 U.S.C. § 543 (1992).

2. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Deputy Chief, Cable Services Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Independent Payphone Association of New York, Inc.; Multiplex Services, Inc.; Teleplex Coin Communications; Inc.; Tel-A-Booth Communications, Ltd.; U.S. Communications of Westchester, Inc.; and Northeast Business Phone Systems, Inc.,

Complainants,

v.

American Telephone and Telegraph Company and New York Telephone Company,

File Nos. E-91-47
E-91-48

Defendants.

ORDER

Adopted: June 30, 1995 Released: July 11, 1995

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. The Independent Payphone Association of New York, Multiplex Services, Inc., Teleplex Coin Communications, Inc., Tel-A-Booth Communications, LTD., U.S. Communications of Westchester, Inc., and Northeast Business Phone Systems, Inc., filed the above-captioned formal complaints against American Telephone and Telegraph Company (AT&T) and New York Telephone Company (NYT) alleging that the defendants violated Sections 201 and 202 of the Communications Act of 1934, 47 U.S.C. §§ 201, 202, in connection with charges incurred by the complainants for allegedly fraudulent calls placed from or to certain pay telephones owned or operated by the complainants (not including the Independent Payphone Association of New York). Both AT&T and NYT denied the allegations and NYT filed a motion to dismiss.

2. On June 1, 1995, the complainants, with the exception of Tel-A-Booth Communications, Ltd. (Tel-A-Booth), jointly filed a motion to dismiss their complaints without prejudice[1] on the grounds that they have resolved their disputes with the defendants.

3. Both prior to and following the receipt of the complainants' motion, Enforcement Division staff contacted Tel-A-Booth several times by telephone and once by letter to inquire whether it intended to pursue its claims against the defendants, particularly in light of its pending bankruptcy proceeding.[2] The staff informed Tel-A-Booth that a failure to respond could result in dismissal of its complaint for failure to prosecute.[3] Tel-A-Booth has not responded to the staff's letter, nor has it otherwise contacted the staff regarding its complaint. We view complainant Tel-A-Booth's failure to respond an indication that it does not intend to pursue its complaint.

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[1] In their motion, the complainants state that they "wish to reserve their right to once again come before the Commission with respect to any conduct which [they] believe to be unjust and unreasonable." Motion to Dismiss at 3.

[2] Letter from Michelle M. Carey, FCC Counsel, to Martin Ochs, Counsel for Tel-A-Booth, dated June 5, 1995.

[3] Id.

4. In view of the above, we will dismiss the above-captioned complaints. The complainants' request that we do so without prejudice, however, is denied. The complainants have represented that they have resolved their disputes with the defendants that gave rise to their complaints. We see no interests to be served by leaving open the possibility of revisiting the complainants claims' at some later time. To the extent that the defendants at some future time are alleged to have engaged in the same type of conduct that gave rise to the instant complaints, such conduct will constitute a separate and independent cause of action and complaints would be free to file their claims, if any, at that time.

5. Accordingly, IT IS ORDERED, pursuant to Section 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 151(j), 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the complainants' Motion to Dismiss IS GRANTED IN PART and DENIED IN PART.

6. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Pacific Bell
Revisions to Tariff F.C.C. No. 128 Transmittal No. 1788

ORDER

Adopted: May 10, 1995 Released: May 10, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 27, 1995, Pacific Bell filed Transmittal No. 1788 to revise its Tariff F.C.C. No. 128. Transmittal No. 1788, which is scheduled to become effective on May 11, 1995, would add an additional wire center, ORNGCA11, to Pacific Bell's expanded interconnection service. No petitions were filed against the Pacific Bell transmittal.

2. Transmittal No. 1788 raises the same issues regarding rate levels, rate structures, and terms and conditions of service as those identified in the *Physical Collocation Tariff Suspension Order*.[1] Therefore, Transmittal No. 1788 is suspended for one day, following the effective date, and will be subject to the investigation initiated in the *Physical Collocation Tariff Suspension Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1788, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al.*, Order, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com.Car.Bur. 1993) (*Physical Collocation Tariff Suspension Order*).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CC Docket No. 94-97

In the Matter of

BellSouth Telecommunications, Inc.
Revisions to Tariff F.C.C. No. 1 Transmittal No. 276

ORDER

Adopted: May 10, 1995; Released: May 11, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 29, 1995, BellSouth Telecommunications, Inc. (BellSouth) filed Transmittal No. 276 to revise its Tariff F.C.C. No. 1. Transmittal No. 276, which is scheduled to become effective on May 13, 1995, would change the labor rate for training BellSouth's technicians from one hour increments to one-half hour increments. The transmittal also eliminates a reference to Shared Network Arrangements, as it is no longer applicable to BellSouth's virtual collocation service. Additionally, the transmittal incorporates Universal Service Codes for billing training rate elements. No petitions were filed against the BellSouth transmittal.

2. The transmittal filed by BellSouth raises the same issues as the permanent virtual collocation tariffs that were suspended for one day and made subject to the investigation initiated in the *Virtual Collocation Tariff Suspension Order*.[1] Therefore, the above-captioned transmittal is suspended for one day, until May 14, 1995, and will be subject to the investigation initiated in the *Virtual Collocation Tariff Suspension Order*. This transmittal will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revision to BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1, Transmittal No. 276, IS SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that BellSouth Telecommunications, Inc. SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules,

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[1] Ameritech Operating Companies *et. al.*, CC Docket No. 94-97, Order, 10 FCC Rcd 1960 (1994) (*Virtual Collocation Tariff Suspension Order*).

The *Virtual Collocation Tariff Suspension Order* suspended for one day and initiated an investigation of the permanent virtual collocation tariffs filed on September 1, 1994 by the Tier 1 local exchange carriers subject to expanded interconnection requirements. In the *Phase I Designation Order*, the Bureau designated issues for investigation regarding the overhead loadings in the LECs' virtual collocation tariffs, and Bell Atlantic's maintenance-related charges. Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase I, Order Designating Issues for Investigation, DA 95-374, (released Feb. 28, 1995) (*Phase I Designation Order*).

47 C.F.R. §§ 61.56, 61.58, and 61.59. BellSouth Telecommunications, Inc. should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), BellSouth Telecommunications, Inc. shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1790
Tariff F.C.C. No. 128

ORDER

Adopted: May 11, 1995 Released: May 11, 1995

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 28, 1995, Pacific Bell (PacBell) filed Transmittal No. 1790 to introduce Synchronous Optical Network (SONET) Ring and Access Services. PacBell explains that SONET Ring and Access Services is a synchronized digital fiber optic hierarchy used to transport special access services at operating speeds from 1.5 Mbps to 2.4 Gbps, with circuit performance monitoring and advanced network alarming and management. PacBell further explains that SONET can use embedded fiber optic cable, eliminate layers of multiplexing and permit end-to-end management of the network.[1]

2. On April 12, 1995, MFS Communications Company, Inc. (MFS) filed a petition to reject Transmittal No. 1790. MFS argues that the new SONET Ring and Access Services tariff proposed by PacBell fails to include provisions for cross-connection by parties that have established expanded interconnection arrangements with PacBell.[2] MFS states that the PacBell filing introduces a new high capacity DS1 and DS3 equivalent service. MFS then says that by not including rate elements or rates for cross-connects, PacBell fails to comply with the Commission's Order[3] that LECs must file tariffs for expanded interconnection for DS1 and DS3 service within 120 days from the date of such Order.[4] MFS therefore requests the Commission to reject the filing and instruct PacBell to refile its proposed offering with rate elements and rates for cross-connection by interconnected parties. In addition, MFS claims that PacBell should structure the cross-connect elements to reflect volume and term discounts, and nonrecurring charge waivers that apply to the other SONET Ring and Access Service elements.[5]

3. In its reply filed April 24, 1995, PacBell maintains that MFS is actually asking the Commission to change the rules it established in the *Special Access Physical Collocation Order*. PacBell claims that the language MFS relies upon in that Order clearly applies to services which existed at that time (namely, DS1 and DS3 services).[6] PacBell states that SONET Ring and Access Service is a new service and that for services other than DS1 and DS3, the Commission clearly ordered LECs to file an expanded interconnection tariff

[1] Transmittal No. 1790 Description and Justification at 1.

[2] *MFS Petition* at 1.

[3] *See* Expanded Interconnection With Local Telephone Companies, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7489-90 (1992) (*Special Access Physical Collocation Order*), *vacated in part on other grounds*.

[4] *MFS Petition* at 2.

[5] *Id.* at 3.

[6] *PacBell Reply* at 2.

within 45 days of receipt of a *bona fide* request for cross-connects to the new service.[7] PacBell also argues that a requirement that a carrier include volume and term discounts in its expanded interconnection tariff has already been rejected by the Commission and that the same result should follow here.[8]

4. The Tariff Division has reviewed PacBell's Transmittal No. 1790 and the related pleadings. We conclude that no compelling argument has been presented that this tariff is patently unlawful so as to warrant rejection.

5. Accordingly, IT IS ORDERED that the petition to reject PacBell's Transmittal No. 1790 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Chief, Tariff Division
Common Carrier Bureau

[7] *Id.* at 3, *citing, Special Access Physical Collocation Order*, 7 FCC Rcd 7369, 7490, fn. 603.

[8] *Id.* at 4.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 92-264

In the Matter of

Implementation of Section 11(c)
of the Cable Television Consumer
Protection and Competition Act of 1992
Vertical Ownership Limits

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION OF THE SECOND REPORT AND ORDER

Adopted: April 5, 1995 Released: April 6, 1995

By the Commission:

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Appendix A: List of Commenters
Appendix B: Survey Summary

I. INTRODUCTION

1. This *Memorandum Opinion and Order* disposes of petitions for reconsideration filed by the Center for Media Education/Consumer Federation of America ("CME") and Bell Atlantic Corporation ("Bell Atlantic").[1] The petitions seek reconsideration of certain aspects of the *Second Report and Order* in MM Docket 92-264 ("*Second Report and Order*"),[2] in which the Commission, among other things, established rules limiting the number of cable channels that a cable operator can devote to video programming services in which the cable operator has an attributable interest ("channel occupancy limits").[3]

2. Generally, CME asks the Commission to reconsider the *Second Report and Order* by: (1) reducing the channel occupancy limit from 40% to 20% of activated channels; (2)

[1] A list of the parties responding to the petitions on the issue of channel occupancy limits is attached as Appendix A.

[2] 8 FCC Rcd 8565 (1993).

[3] Also currently under reconsideration in MM Docket No. 92-264 are the Commission's horizontal ownership limits, 47 C.F.R. § 76.503, and the attribution standard we adopted for both the horizontal ownership rules and the channel occupancy limits. This *Memorandum Opinion and Order* only deals with the cable channel occupancy rules, 47 C.F.R. § 76.504.

reversing our decision to include over-the-air broadcast,[4] public, educational and government ("PEG"), and leased access channels when calculating total channel capacity; (3) reversing our decision to exempt local and regional networks from channel occupancy limits; (4) reversing our decision not to apply channel occupancy limits beyond a system's first 75 channels; and (5) reversing our decision to grandfather all vertically integrated programming services being carried as of December 4, 1992, the effective date of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). Bell Atlantic asks us to reconsider our decision to apply the channel occupancy limits to cable systems that face actual head-to-head competition.

3. For the reasons set forth below, we deny CME's and Bell Atlantic's petitions and reaffirm our decision in the *Second Report and Order*.

II. BACKGROUND

4. Section 11(c)(2)(B) of the 1992 Cable Act[5] requires the Commission "to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[6] This provision grew out of Congress' concern that vertical integration in the cable industry had given cable operators the incentive and ability to favor their affiliated programmers over unaffiliated programmers.[7] As a result, Congress found that unaffiliated programmers may have difficulty in obtaining carriage on vertically integrated cable systems. In addition to impeding competition, the record before Congress indicated that vertical integration could limit the diversity of cable programming and reduce the number of voices available to the public.[8]

5. However, there was also evidence before Congress that vertical integration is not necessarily anti-competitive. The House Report cited a 1988 study by the National

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[4] CME seems to use the terms "broadcast channels" and "must-carry channels" interchangeably. In the interest of consistency, we will use the term "broadcast channel" to refer to any over-the-air broadcast station being carried by a cable system, whether they are "must-carry" stations or not.

[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[6] Section 11(c)(2)(B) of the 1992 Cable Act, 47 U.S.C. §533(f)(1)(B). Congress complemented Section 11's structural constraints on vertical integration with prohibitions on specific types of unfair or discriminatory behavior. For example, Section 12 of the 1992 Cable Act prohibits, among other things, cable operators from discriminating against unaffiliated programmers in the selection, terms, or conditions of carriage ("program carriage" rules); Section 19 prohibits unfair methods of competition, and proscribes several specific practices by vertically-integrated cable operators and programming services, in order to make such programming services available to cable's competitors ("program access" rules).

[7] *See, e.g.*, Section 2(a)(5), 1992 Cable Act. Section 11's legislative history is discussed at length in the *Second Report and Order*. We restate part of that history here for the convenience of the reader.

[8] *See* Report of the House Committee on Energy and Commerce, H.R. Rep. No. 102-628 ("House Report"), 102d Cong., 2d Sess. 41, 43 (1992). The House Report also stated that some vertically integrated cable operators discriminated against unaffiliated programming services regarding price, channel positioning, and promotion. *Id.* at 41. Likewise, the Senate Report examined cable operators' exercise of "market power derived from their de facto exclusive franchises and lack of local competition" and stated that "[t]hese concerns are exacerbated by the increased vertical integration of the cable industry." Report of the Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92 ("Senate Report"), 102d Cong., 1st Sess. 24 (1991).

Telecommunications and Information Administration which concluded that common ownership of cable systems and cable programmers did not appear to have adversely affected the amount or diversity of programming choices, and that the largest cable operators did not show a pattern of favoring the programmers with which they were affiliated.[9]

6. At the same time, the record before Congress demonstrated that vertical integration could produce certain legitimate benefits. For instance, the Senate Report cited testimony that "vertical integration has been the means by which we have stimulated the development of programming that was necessary to flesh out the promise of cable . . . when nobody else was really willing to step up and put up the money."[10] Similarly, the House Report cited testimony that the financial support of vertically integrated cable operators made the creation of innovative and risky programming possible.[11] In particular, these witnesses pointed to C-Span, Cable News Network ("CNN"), Black Entertainment Television ("BET"), Nickelodeon, and the Discovery channel as examples of innovative programming services that would not have been feasible without the financial support of cable operators.[12]

7. In light of these competing interests, Congress expressly directed the Commission to consider and balance the following factors in establishing "reasonable" ownership limits under Section 11: (1) ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer; (2) ensure that cable operators do not favor affiliated video programmers in determining carriage and do not unreasonably restrict the flow of video programming of affiliated video programmers to other video distributors; (3) take account of the market structure, ownership patterns, and other relationships of the cable industry, including the market power of the local franchise, joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests; (4) take into account any efficiencies and other benefits that might be gained through increased ownership or control; (5) make rules and regulations that reflect the dynamic nature of the communications marketplace; (6) impose no limitations that would prevent cable operators from serving previously unserved rural areas; and (7) impose no limitations that would impair the development of diverse and high quality programming.[13]

8. Pursuant to the statutory requirements of Section 11, the *Second Report and Order*[14] established channel occupancy rules, including the following rules relevant here:

(a) *Percentage Limitation* -- Cable operators may devote no more than 40% of their activated channels to the carriage of programming services in which they have an attributable interest.[15] After consideration of the

[9] House Report at 41.

[10] Senate Report at 27, citing testimony of James Mooney (NCTA), "Oversight of Cable TV," pp. 178-79.

[11] House Report at 41.

[12] *Id.*

[13] 47 U.S.C. § 533(f)(2).

[14] Prior to the *Second Report and Order*, we issued a *Notice of Proposed Rulemaking and Notice of Inquiry*, 8 FCC Rcd 210 (1992)("*Notice*"), seeking comment on various issues relating to channel occupancy limits. Subsequently, we issued a *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 6828 (1993)("*Further Notice*"), seeking additional comment on specific proposals regarding the adoption and implementation of the issues identified in the *Notice*, including those issues raised by Petitioners here.

[15] A cable operator may devote two additional channels, or up to 45% of its channel

comments and the competing interests identified by Congress, the Commission found that the 40% limit "is appropriate to balance the goals of increasing diversity and reducing the incentive and ability of vertically integrated cable operators to favor their affiliated programming, with the benefits and efficiencies associated with vertical integration."[16] The Commission adopted the broadcast attribution rules for purposes of determining when a vertical ownership interest would be "attributable."[17]

(b) *Calculation of Channel Capacity* -- All activated channels will be included in calculating channel capacity, including broadcast, PEG and leased access channels.[18] Among other reasons, we noted that these channels promoted diversity and provided alternative sources of unaffiliated programming to subscribers in furtherance of the 1992 Cable Act's objectives.[19]

(c) *Local and Regional Networks* -- Channel occupancy limits will apply only to "national" programming services (i.e., local and regional programming services are exempt).[20] We considered such an exemption to be an important means of encouraging continued investment by multiple-system operators ("MSOs") in the development of local cable programming, which is responsive to the needs and tastes of local audiences and serves Congress' objectives of promoting localism.[21]

(d) *75-Channel Cap* -- Channel occupancy limits will apply to a maximum of 75 channels per system.[22] We found that since exceeding this level was possible only with the deployment of emerging technologies such as fiber optic cable or digital signal compression, the greatly expanded channel capacities provided by these technologies would help obviate the need for channel occupancy limits as a means of encouraging cable operators to carry unaffiliated programming.[23]

(e) *Grandfathering of Existing Vertical Relationships* -- All vertically integrated programming services carried as of the effective date of the 1992 Cable Act (December 4, 1992) could continue to be carried.[24] We found that the public interest would be disserved by requiring cable operators to delete vertically integrated programming in order to comply with the new channel occupancy caps. We believed that permitting the continuation of existing relationships would prevent subscriber confusion, and would minimize the disruption to existing programming services and existing carriage agreements.[25] However, once additional capacity becomes available on such a system, the cable operator may not add any additional affiliated programming until its system fully complies with the channel occupancy limits.[26]

(f) *Effective Competition* --

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capacity, whichever is greater, to the carriage of video programming owned by or attributable to the operator provided such video programming is minority-controlled. The petitions do not directly ask us to reconsider this aspect of the channel occupancy rules.

[16] *Second Report and Order* at ¶¶ 68-71.

[17] *Id.* at ¶¶ 61-63; *See also* 47 C.F.R. § 73.3555.

[18] *Id.* at ¶ 54.

[19] *Id.*

[20] *Id.* at ¶ 78.

[21] *Id.*

[22] *Id.* at ¶¶ 83-84.

[23] *Id.*

[24] *Id.* at ¶¶ 93-94.

[25] *Id.*

[26] *Id.*

Channel occupancy limits will not be eliminated in communities where actual head-to-head competition exists.[27] We found that the competition standard in the 1992 Cable Act was not adopted for the same purpose as the vertical ownership limits, and thus it may not address all of Section 11's relevant concerns.

III. PETITIONS FOR RECONSIDERATION

9. We have again reviewed the record in light of Petitioners' arguments on reconsideration and find no reason to depart from our prior rulings in the *Second Report and Order*. We briefly address Petitioners' contentions below.

A. CME Petition

10. CME filed a joint *Petition for Reconsideration* asking the Commission to reconsider several issues decided in the *Second Report and Order*. Specifically, CME asks the Commission to: (1) reduce the channel occupancy limit from 40% to 20%; (2) require that broadcast, PEG, and leased access channels be subtracted from the number of activated channels before calculating total channel capacity; (3) eliminate our exemption for local and regional networks; (4) apply channel occupancy limits beyond a system's first 75 channels; and (5) reverse our decision to grandfather all vertically integrated programming services carried as of December 4, 1992.

11. *Percentage Limitation*. In asking that the Commission lower its channel occupancy limit from 40% to 20%, CME argues that the Commission overstated the benefits of vertical integration. For instance, CME asserts that "there has been no successful launch of an unaffiliated video programmer since the cable industry began the trend toward vertical integration,"[28] and that MSO investment is not vital because programming services like CNN, BET and Nickelodeon were successful prior to any operator affiliation.[29] CME also states that the Commission ignored a potential scenario submitted during the rulemaking proceeding by the Motion Picture Association of America ("MPAA"), showing that a 40% channel occupancy limit applied to a 36-channel system could result in no channels being available for unaffiliated programmers.[30] Finally, CME contends that its proposal would not harm investment in programming services. By lowering the channel occupancy limit to 20%, CME states that many MSOs could still invest in new programming, while retention of the 40% limit "will likely chill the development of independent programming by providing a disincentive to independent investors who may want to invest in video programming but feel there would be no way to get carriage on a cable system that also owns a substantial percentage of programming."[31]

12. *Comments*. Several parties dispute CME's contentions regarding the consequences of vertical integration. Liberty Media Corporation ("Liberty Media") states that services like CNN and BET "credit their very existence to timely investments by cable operators when no one else was willing to make a similar investment,"[32] and that CME's proposed channel occupancy limits would "stifle investment in new programming services and disrupt existing program schedules."[33] Turner Broadcasting System, Inc. ("TBS") cites ESPN2, FLIX, and the Sci-Fi Channel as examples of unaffiliated programming which became successful even after the industry trend towards

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[27] *Id.* at ¶ 88.

[28] CME Petition at 19.

[29] *Id.*

[30] *Id.* at 15.

[31] *Id.* at 19-20.

[32] Liberty Media Opposition at 17.

[33] *Id.* at 18.

vertical integration.[34] On the other hand, the National Cable Television Association ("NCTA") contends that CME gives no support for its conclusion that the 40% limit will not prevent discrimination against unaffiliated programmers.[35] Tele-Communications, Inc. ("TCI") takes issue with CME's assertion that the 40% limit could result in no channels being made available to unaffiliated video programmers, and states that "[m]any services unaffiliated with TCI, such as the Nashville Network, Lifetime, the USA Network, and ESPN, have nearly universal carriage on TCI systems. By contrast, a number of services in which TCI has an attributable interest, such as the Learning Channel, Courtroom Television Network, and E! Entertainment, are carried on less than one-third of TCI's systems."[36]

13. In reply, CME states that while it agrees that Congress required a balance to be struck in Section 11,[37] Congress rejected the notion that ownership limits were not needed because the benefits of vertical integration outweighed the dangers.[38] By giving too much weight to the alleged benefits of vertical integration, CME argues that the Commission did not adhere to the regulatory scheme contemplated by the 1992 Cable Act.[39]

14. *Discussion*. After consideration of the various submissions, we decline to modify the 40% channel occupancy limit. As CME acknowledges, in requiring the Commission to establish "reasonable" channel occupancy limits, Congress directed us to balance the risks of vertical integration against benefits such as the development of diverse and high quality video programming. We continue to believe that the 40% limit strikes the appropriate balance between these competing objectives. We note, in this regard, that CME filed the only petition seeking reconsideration of the 40% limit. No cable operator or cable programmer filed for reconsideration claiming that the channel occupancy limit was set too low to encourage continued investment. Conversely, none of the parties that previously proposed a lower occupancy limit,[40] and no unaffiliated programmers (with the partial exception of Viacom International, Inc. ("Viacom")),[41] has joined CME in claiming that the limit was set too high to deter discriminatory conduct.

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[34] TBS Opposition at 2.

[35] NCTA Opposition at 16.

[36] TCI Opposition at note 23.

[37] CME Reply to Oppositions at 2.

[38] *Id.*

[39] *Id.*

[40] *See, e.g.*, Comments of the Association of Independent Television Stations, Inc., filed February 9, 1993 (proposing to impose an immediate channel occupancy limit of 20%, and to prohibit cable operators prospectively from acquiring equity interests in additional programming services); Comments of the Motion Picture Association of America, filed February 9, 1993 (advocating a 20% occupancy limit for affiliated programming in which a cable operator has a 15% ownership interest).

[41] Viacom supports CME's request for a 20% channel occupancy limit only if we do not adopt Viacom's proposed 15% horizontal ownership limit; even then Viacom would only apply the 20% occupancy limit to those cable operators exceeding a 15% horizontal ownership level. *See* Viacom Comments at 15-18. In today's market, that means that Viacom would apply a 20% channel occupancy limit only to TCI, and possibly to Time Warner Entertainment Company, L.P. ("Time Warner"). *See First Report on the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 94-48 (released September 28, 1994) ("*First Competition Report*"), Appendix G-1, G-2. To the extent Viacom's suggestion requires a response, we decline to adopt a stricter channel occupancy limit for a small number of the largest cable operators on the same grounds that we decline to adopt a stricter occupancy limit for all cable operators.

15. We are not persuaded by CME's arguments to reduce the channel occupancy limit from 40% to 20%. First, CME claims that the *Second Report and Order* "erroneously ignored evidence provided by the Motion Picture Association of America ("MPAA") that a 40% limit could result in instances where no channels are available to unaffiliated programmers."[42] However, CME then quotes at length from our response (which we hereby reaffirm) to MPAA's hypothetical scenario. Generally, we pointed out that MPAA's calculation failed to take into account that broadcast, PEG and leased access channels already provided substantial unaffiliated programming, and assumed that large cable operators would drop popular, unaffiliated programming in favor of less popular affiliated services.[43] Indeed, despite vertical integration, 8 of the top 25 programming services have no cable ownership affiliation, while the identity of these popular services has remained relatively stable since 1990.[44]

16. Moreover, CME may have overstated the practical effect of must-carry, PEG and leased access requirements. In the absence of record evidence on this point, the Commission examined an unscientific sampling of 25 TCI and Time Warner Entertainment Company, L.P. ("Time Warner") cable systems (those being the most vertically integrated cable operators) in order to determine whether, in fact, broadcast, PEG and leased access channels occupied all, or nearly all, of the systems' unaffiliated programming channels.[45] Generally, the Commission found that, even after excluding broadcast, PEG and leased access channels (and even assuming the presence of two local or regional networks), all of the systems had capacity remaining for additional unaffiliated programming.[46] The disparity between our findings and CME's hypothetical scenario is largely due to the fact that a cable operator's theoretical must-carry requirement typically well exceeds the channels that are actually required to be devoted to that obligation. While the Commission's survey was admittedly unscientific, we do believe it lends some credence to our view that CME's worst-case scenario may have limited real world significance.

17. Next, CME claims that we overstated the benefits of vertical integration. As proof, CME states that CNN, BET, and Nickelodeon were successful prior to their relationship with cable operators, and that "there has been no successful launch of an unaffiliated video programmer since the cable industry began the trend toward vertical integration." Whether or not CNN, BET and Nickelodeon achieved some initial independent success, there is evidence in the record that these and other programmers would have had difficulty sustaining their success had it not been for

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[42] CME Petition at 15.

[43] *See Second Report and Order*, at n. 88.

[44] *First Competition Report*, ¶¶ 162-63; Appendix at G-14. Since 1990, only three new programming services have entered the top 25; of those services, one is vertically integrated and two are not. Also since 1990, cable operators have acquired ownership interests in two of the top 25 services and divested interests in one. *Id.*

[45] The Commission sampled 9 TCI systems and 5 Time Warner systems of 35-41 activated channels ("smaller systems"), and 6 TCI systems and 5 Time Warner systems of 48-57 activated channels ("larger systems"). The survey was based on information supplied by the cable operators themselves in the Television and Cable Factbook, Vol. 62 (1994 ed.). *See* Appendix B.

[46] *Id.* TCI smaller systems had between 5 and 11 channels available for additional unaffiliated programming; TCI larger systems had between 6 and 20 such channels available; Time Warner smaller systems had between 6 and 9 such channels available; and Time Warner larger systems had between 10 and 17 such channels available.

cable operator investment.[47] Likewise, CME's assertion that there has been no successful launch of an unaffiliated programmer since vertical integration has taken hold was disputed by TBS, citing the recent successes of ESPN2, FLIX and the SciFi Channel.[48] CME did not take issue with TBS's examples on reply.

18. Similarly, there is no evidence in the record to substantiate CME's claim that the 40% limit will deter independent investors from investing in video programming, or that independent investors are currently deterred from investing in cable programming by our channel occupancy limits.

19. Finally, we disagree with CME's assertion that the Senate Report "suggested" a 20% channel occupancy limit. The Senate Report stated: "For example, the FCC may conclude that each MSO should control no more than 20 percent of the channels on any cable system . . .."[49] Thus, the Report used the 20% figure for illustrative purposes only, while clearly acknowledging that the Commission was free to choose a different limit. This interpretation is supported by the actual wording of the statute, which simply requires the Commission to establish "reasonable" channel occupancy limits.

20. *Calculation of Channel Capacity.* CME asks that the Commission reverse its decision to include broadcast, PEG, and leased access channels when calculating system capacity.[50] CME asserts that these channels should not be counted because broadcast channels are only available to local broadcast stations, PEG channels are available only to public, educational, and governmental institutions, and leased access has limited capacity and requires unaffiliated programmers to pay for carriage.[51] CME also maintains that the legislative history indicates that these channels should be subtracted before application of channel occupancy limits.[52] Finally, CME argues that because

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[47] *See, e.g., Comments of Turner Broadcasting System, Inc.*, filed 2/9/93, at 12 (at a time when TBS's "independence was very much at stake," cable operators were willing to provide long-term equity under terms others were not); *Opposition of Black Entertainment Television, Inc. to Comments of Viacom International, Inc.*, filed 2/22/94, at 2 ("[C]able investment has been crucial to establishing BET as a viable and valuable programming service.").

[48] In fact, ESPN2, a service with no cable ownership, had the highest initial market penetration of any programming service launched in the last four years. *First Competition Report*, at 81. It is unclear to what extent this success is related to "retransmission consent" negotiations between ESPN2's network corporate affiliate, ABC/Capital Cities, Inc., and cable operators. *See* 47 U.S.C. § 325(b).

[49] Senate Report at 80 (emphasis added).

[50] CME Petition at 17.

[51] CME Petition at 16-18.

[52] The Senate Report stated in relevant part:

> The intent of this provision is to place reasonable limits on the number of channels that can be occupied by each MSO's programming services. For example, the FCC may conclude that each MSO should control no more than 20 percent of the channels on any cable system, with a minimum of 6 channels being permissible. The FCC should establish [channel occupancy] rules based on the number of activated channels less the numbers of over-the-air broadcast signals carried and the number of public, educational and governmental and leased access channels carried. On a system with 54 channels, 14 of which are occupied by over-the-air signals or access channels, the limit then would be eight channels that could be occupied by programming owned by an MSO . . . "

Congress enacted three separate provisions -- channel occupancy limits, broadcast carriage requirements and leased access -- to increase the diversity of ownership and ideas in the cable industry, it would contravene Congress' regulatory intent to use two of those provisions as grounds for weakening the third.[53]

21. *Comments.* In opposition, TCI states that it is "unaware of any case where it has been deemed appropriate to exclude from the market being examined a particular quantity of output merely because it is produced by a firm other than a vertically integrated firm,"[54] and that:

> [L]eased access, PEG and must carry channels themselves constitute significant channel occupancy limits and clearly dilute the ability of a cable operator to exercise market power over all channels on it system. Therefore, such channels are properly included in the universe of channels for determining channel occupancy limits.[55]

22. NCTA argues that "excluding such channels would penalize those operators who offer a wide array of broadcast and access services by limiting their options in programming their remaining channels."[56] Further, NCTA states that mandated carriage of PEG, must-carry and leased access channels promotes the same goals (such as diversity) as channel occupancy limits.[57] In addition, Time Warner asserts that Congress' objective was diversity of programming sources, and that PEG, leased access and broadcast programming are as "diverse" as any other unaffiliated programmers.[58] Time Warner states that as a result of must-carry, PEG and leased access requirements, it can no longer select the programming on an average of 30%, and in some cases as much as 50%, of its systems' channels.[59] Finally, Liberty Media asserts that simply because PEG, must-carry and leased access "also serve other objectives does not detract from their effectiveness in ensuring that cable subscribers receive programming and information from sources unaffiliated with the cable operator."[60]

23. CME replies that the purpose of channel occupancy caps was to "give independent commercial programmers a chance to get on the wire."[61] Thus, while MSOs may view PEG, must-carry, and leased access as "lost" channels, they do not benefit independent programmers, and should be excluded when calculating channel capacity.[62]

24. *Discussion.* We deny CME's petition to reconsider our treatment of over-the-air broadcast, PEG and leased access channels. CME correctly notes that the channel occupancy limits are intended to keep cable operators from filling every available channel with their own programming. But from this premise, CME draws the conclusion that channel occupancy limits must therefore be intended to give "independent commercial programmers a

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Senate Report at 80.

[53] CME Petition at 16-18.

[54] TCI Opposition at 11.

[55] *Id.* at 11-12.

[56] NCTA Opposition at 12-13.

[57] *Id.* at 13.

[58] Time Warner Opposition at 12.

[59] *Id.* at 13.

[60] Liberty Media Opposition at 15-16.

[61] CME Reply at 7.

[62] CME Reply at 7-8.

chance to get on the wire." The statute, however, does not distinguish between "independent" unaffiliated programmers and other types of unaffiliated programmers. Section 11 simply ensures that subscribers will have access to some kind of unaffiliated programming on a prescribed number of channels. CME does not dispute that broadcast, PEG and leased access channels are "unaffiliated" with cable operators, or that the 1992 Cable Act requires cable operators to reserve channel space for such unaffiliated programming. Thus, we reaffirm our holding in the *Second Report and Order* that it would be unreasonable to subtract such channels before calculating the system's channel capacity, since they provide the type of diverse, unaffiliated programming contemplated by the 1992 Cable Act. Further, as we noted in the *Second Report and Order*, it would be unfair to penalize those cable operators who carried the widest array of broadcast, PEG and leased access channels by decreasing the number of channels available for affiliated programming.

25. Moreover, there is no evidence in the record that "independent" commercial programmers (i.e., those with no cable ownership interests at all) are unable to obtain carriage because of our treatment of broadcast, PEG and leased access channels. To the contrary, in the Commission's sampling of 25 TCI and Time Warner cable systems described above, we found that all of the systems carried some "independent" unaffiliated programmers, with most systems carrying between 7 and 11 such channels.[63]

26. In addition, although the Senate Report's sample calculation excluded broadcast and access channels in calculating channel capacity, CME's reliance on it as an expression of Congressional intent is misplaced. As we stated in the *Second Report and Order*:

> The Senate Report language [. . .] appears to be included merely as an example to illustrate how the Commission may decide to calculate channel occupancy limits and therefore does not prohibit the Commission from adopting an alternative approach if it finds such an approach to be reasonable to promote the legislative objectives. In any event, this language is not included in the statute itself.[64]

27. Finally, we do not believe that we are weakening Congress' statutory scheme by considering the impact of other provisions of the 1992 Cable Act in establishing channel occupancy limits. Section 11 expressly gives the Commission broad discretion to fashion "reasonable" channel occupancy limits. In our view, establishing "reasonable" limits requires us to consider *all* factors bearing on the dangers or benefits of vertical integration. Thus, for instance, we believe that not only should we take into account the impact of broadcast, PEG and leased access channels, but also the impact of Sections 12 and 19 in deterring the types of discriminatory conduct that may be caused by vertical integration. Only by considering the whole of Congress' scheme can we determine the level of vertical structural limits that are "reasonable."

28. *Local and Regional Networks*. In a footnote, CME implies that the Commission should reconsider its decision that local and regional networks will not be subject to channel occupancy

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[63] *See* Appendix B. TCI smaller systems (approximately 36 channels) carried between 7 and 10 "independent" programmers; TCI larger systems (approximately 54 channels) carried between 9 and 13; Time Warner smaller systems carried between 5 and 14; and Time Warner larger systems carried between 9 and 14. Among the independent unaffiliated programming services being carried by the 25 systems sampled were: A & E, ESPN, CNBC, Lifetime, Prevue, The Weather Channel, WGN, Univision, Faith and Value, EWTN, Spice, The Travel Channel and National Jewish TV. *Id.*

[64] *Second Report and Order* at ¶ 54.

limits.[65] CME contends that Congress did not allow for such an exception, and quotes comments of the National Association of Telecommunications Officers and Advisors ("NATOA") during the rulemaking proceeding that "most local and regional networks are owned by large MSO's, and as such are part of the trend of vertical integration Congress meant to address with the Cable Act."[66]

29. *Comments.* Affiliated Regional Communications, Ltd. ("ARC"), Time Warner and Liberty Media argue that CME's proposal is contrary to the fundamental goals of the 1992 Cable Act, especially Section 2(a)(10), which states that there is a "substantial government interest" in the "local origination of programming."[67] ARC also cites the Congressional objective of promoting "diversity of views and information" contained in Section 2(b)(1) of the 1992 Cable Act, and asserts that regional sports programming has promoted both diversity and localism by being an outlet for local and regional sporting events which do not traditionally receive coverage from broadcast or cable.[68] ARC and Liberty Media point out that there is no basis to conclude that local news or sports programming provided by an MSO affiliate would contribute less to the goals of localism and diversity than similar programming provided by a broadcast station owned by a national network or large group owner.[69]

30. *Discussion.* We deny CME's petition to reconsider our exception for local and regional programming. CME's approach overlooks Congress' direction that we consider the benefits as well as the dangers of vertical integration in establishing "reasonable" channel occupancy limits. As we stated in our *Second Report and Order*, the exception for local and regional networks was "an important means of encouraging continued MSO investment in the development of local cable programming, which is responsive to the needs and tastes of local audiences and serves Congress' objectives of promoting localism."[70] CME does not challenge the value of local and regional programming, or our conclusion that given the cost and limited appeal of such programming, an exception may be necessary to encourage continued MSO investment. We continue to believe that consideration of these benefits of vertical integration more accurately reflects Congressional intent, and fully justifies the exception.

31. *75-Channel Cap.* CME asks that the Commission reconsider its decision not to apply channel occupancy limits beyond a cable system's first 75 channels.[71] CME asserts that the danger of discrimination against unaffiliated programmers exists no matter how many channels a cable operator offers, and that "expanded channel capacity will simply mean more opportunities for MSO's to offer affiliated programming to the detriment of unaffiliated programming."[72] CME states that without channel occupancy limits, there is "a strong likelihood" that all new capacity beyond 75 channels will be filled with channels affiliated with the cable operator.[73]

32. *Comments.* Liberty Media responds that CME offers no support for its

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[65] CME Petition at note 10.

[66] *Id.*, quoting NATOA Reply Comments, MM Docket No. 92-264, at 10 (March 3, 1993).

[67] ARC Opposition at 4; Time Warner Opposition at note 11; Liberty Media Opposition at 16.

[68] ARC Opposition at 3-4.

[69] ARC Opposition at 7-8; Liberty Media Opposition at 16-17.

[70] *Second Report and Order* at ¶ 78, *citing* Section 2(a)(10) of the 1992 Cable Act.

[71] CME Petition at 20.

[72] CME Petition at 20.

[73] *Id.* at 21.

assertion that cable operators would fill any new capacity with affiliate programming, and that such discrimination would, in any case, be prohibited by Section 12 of the 1992 Cable Act.[74] Similarly, Time Warner states that cable operators will not have enough affiliated services to fill the space created by new technologies and will need programming from many other sources.[75] NCTA, Time Warner and Liberty Media argue the 75-channel cut-off is reasonable since it reflects the current maximum capacity of most cable systems,[76] while Liberty Media states that lifting channel occupancy limits after the first 75 channels gives "cable operators an incentive to deploy new technologies and improve service to the public."[77] TCI argues that "[s]ignificantly increased channel capacity will result in greater program diversity and expanded consumer choice because cable operators have the incentive to maximize the use of system capacity by seeking out innovative programming services."[78]

33. On reply, CME argues that "[i]f increased capacity will render the limits superfluous, they are not the slightest disincentive to the MSOs [to expand capacity]. And if they do affect incentive (i.e. prevent MSOs from counting on more than 40 percent of even greatly increased capacity), then the former argument is disingenuous, and the limits will be as necessary as ever."[79]

34. *Discussion*. On reconsideration, we decline CME's invitation to eliminate our 75-channel cap. There is no evidence in the record to support CME's claim that "there is a strong likelihood that all of the newly available channels will be filled by services affiliated with the MSO." Indeed, we note that in our informal survey of 25 TCI and Time Warner cable systems, none of the systems were approaching the current 40% channel occupancy limit for affiliated programming.[80] However, even if there were some basis for CME's prediction, we still believe that the vast expansion of channel capacity may obviate the need for a rigid occupancy limit. As we noted in the *Second Report and Order*, although information on how multichannel video distributors will use the additional capacity "is necessarily somewhat speculative," the record indicates that the capacity will likely be used to deliver targeted "niche" video programming services aimed at correspondingly smaller audience sizes, such as pay-per-view and "multiplexed" channels.[81] Occupancy limits in these circumstances do not parallel occupancy limits for more restricted capacity systems where most services are distributed on discrete channels to a significant portion of a system's subscribership. Accordingly, the occupancy limits can be relaxed.[82]

35. In sum, we continue to believe that the introduction of advanced technologies such as signal compression and fiber optics will reduce the need for structural occupancy limits in order to ensure programming diversity and access for

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[74] Liberty Media Opposition at 19-20.

[75] Time Warner Opposition at 17-18.

[76] NCTA Opposition at 14; Time Warner Opposition at 17; Liberty Media Opposition at 20.

[77] Liberty Media Opposition at 20.

[78] TCI Opposition at 13.

[79] CME Reply at 9.

[80] *See* Appendix B. TCI smaller systems devoted between 47% and 79% of the channels available within the 40% limit to affiliated programming; TCI larger systems devoted between 41% and 55%. Time Warner smaller systems devoted between 29% and 53% of the channels available within the 40% limit to affiliated programming; Time Warner larger systems devoted between 25% and 43%.

[81] *See Second Report and Order*, ¶¶ 83-84.

[82] Of course, the prohibitions against discriminatory conduct contained in Sections 12 and 19 will remain in full effect regardless of the number of channels added.

unaffiliated programmers. Nevertheless, as we noted in the *Second Report and Order*, the 75-channel cap will be subject to periodic review and will be eliminated if developments warrant.

36. *Grandfathering of Existing Vertical Relationships*. CME requests that the Commission reconsider its decision to grandfather all vertically integrated programming services carried as of December 4, 1992 (the effective date of the 1992 Cable Act).[83] CME argues that because the Commission does not know how many systems would exceed the channel occupancy caps, the Commission has "no basis for its claim that application of the limits is outweighed by the need to avoid disruption of consumer service."[84] Moreover, CME asserts that grandfathering existing vertically integrated programmers is contrary to Congress' desire to limit channel capacity "based on the market power that derives from existing levels of vertical integration."[85]

37. *Comments*. Time Warner argues that grandfathering is appropriate, since Congress requires the Commission to prescribe regulations that "take particular account of the market structure, ownership patterns, and other relationships in the cable industry"[86] In addition, Time Warner, TCI and Liberty Media assert that the rule prevents subscriber confusion and unhappiness, and minimizes disruption to carriage and service agreements.[87] Finally, Time Warner and Liberty Media argue that grandfathering does not dilute the purpose of channel occupancy limits because operators must come into compliance as new space becomes available on cable systems.[88]

38. CME replies that the amount of disruption that would ensue without grandfathering merely highlights the size of the problem Congress was trying to address; to the extent such disruption is avoided, Congress' intent in enacting Section 11 is "undermined."[89]

39. *Discussion*. We deny CME's petition to reconsider our decision grandfathering existing vertical relationships. We still believe, as we held in the *Second Report and Order*, that the public interest would be disserved by requiring cable operators to delete vertically integrated programming services to comply with the channel occupancy caps. We continue to believe that grandfathering existing arrangements will limit consumer confusion and the disruption of existing programming relationships, and is, as Time Warner points out, consistent with Congress' direction that our channel occupancy limits "take particular account of the market structure, ownership patterns, and other relationships of the cable television industry."[90]

40. We also reject CME's contention that our decision to grandfather existing vertical arrangements "has rendered impotent" the intent of Congress to limit excessive vertical integration.[91] First, we reiterate that Congress directed us to establish "reasonable" channel occupancy limits based on a balancing of competing interests; if Congress wished to require the divestiture of existing channels it could have done so. More importantly, our decision did not grandfather non-

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[83] CME Petition at 21.

[84] *Id.*

[85] *Id.* at 21-22.

[86] Time Warner Opposition at 19; *see also* TCI Opposition at 14-15.

[87] TCI Opposition at 14-15; Time Warner Opposition at 19; Liberty Media Opposition at 21.

[88] Time Warner Opposition at 19; Liberty Media Opposition at 21.

[89] CME Reply at 9.

[90] Communications Act, § 613(f)(2)(C).

[91] CME Petition at 22.

compliance in perpetuity. Rather, the *Second Report and Order* provided that when a grandfathered cable system adds channel capacity, it cannot add an affiliated programming service until its system is in full compliance with our channel occupancy rules. Thus, the difference is more one of timing than of ultimate objectives. While CME suggests immediate divestiture of existing services to bring systems into compliance, our approach is to grandfather existing services and remedy non-compliance prospectively. We continue to believe that our approach better reflects the various interests at stake, and thus better reflects Congress' intent.

B. Bell Atlantic Petition

41. *Competition.* Bell Atlantic filed a Petition for Limited Reconsideration requesting that the Commission reconsider its decision to apply the channel occupancy limits to cable systems that face actual head-to-head competition. Bell Atlantic states that although Congress was concerned that cable operators might block independent programmers from reaching consumers, this concern is relevant only in the absence of local competition. If such competition does exist, Bell Atlantic argues that independent programmers will have alternate means of delivering their programming, and that competing distributors will have strong incentives to ensure that consumers receive valued programming, regardless of the source.[92]

42. According to Bell Atlantic, the only effect of applying channel occupancy limits to competitive systems will be that particular programs will be banned from delivery and competition and diversity will be reduced. In fact, Bell Atlantic notes that requiring new entrants to maintain a warehouse of unused capacity in the event that someone may later want to use it would impede competitive entry and prevent the development of competition in the first instance.[93] Finally, Bell Atlantic adds that in markets where one of the competitors is a video dialtone system, which is required to provide access to all programmers on a non-discriminatory basis, there is even further assurance that independent programmers will have a means of delivering their programming.[94]

43. *Comments.* Only CME filed an Opposition to Bell Atlantic's Petition. CME states that Bell Atlantic's argument rests on unsupported speculation about the future of the industry, and thus presents no justification as to why the Commission should drop the channel occupancy limits at this time.[95] CME also argues that because Congress specifically stated in the 1992 Cable Act that rate regulation will be lifted where there is effective competition, but did not similarly call for the lifting of ownership limits if competition developed, Congress must have intended ownership limits to apply in both competitive and monopoly markets.[96]

44. CME also disagrees with Bell Atlantic's claim that local competition diminishes the incentive or ability of cable operators to favor affiliated programmers over independent programmers.[97] First, CME points to the legislative history of the 1992 Cable Act which found that large MSOs have disfavored independent programmers through discriminatory pricing, channel positioning and promotion or outright denial of access. CME notes that Bell Atlantic has presented no evidence that local competition will eliminate this discrimination. Second, CME agrees with the point made by MPAA that competitors may themselves be vertically integrated and thus provide

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[92] Bell Atlantic Petition at 3.

[93] *Id.*

[94] *Id.* at 4.

[95] CME Opposition at 2.

[96] *Id.* at 3.

[97] *Id.* at 4.

no alternative for an independent programmer.[98] CME also does not believe that new entrants will be unable to find sufficient programming to fill their channels; in fact, there is a plethora of new programming. CME states that it is not aware of any existing video dialtone system and that such systems will take years and billions of dollars to become operational, let alone a competitive alternative to cable, and thus cannot justify the removal of ownership restrictions.[99] Finally, CME notes that Congress apparently did not believe that a pay-for-carriage service such as video dialtone would vitiate the need for ownership limits, because it included *both* leased access and ownership limits in the 1992 Act.[100]

45. In its Reply, Bell Atlantic states that the point of its Petition was not that ownership limits should be removed whenever there is some "theoretical" possibility of competition in the future, but that ownership limits should not apply to any competition --whether a traditional cable system or a common carrier video dialtone system -- "where actual head-to-head competition exists."[101] Bell Atlantic also points out that while there are approximately 90 national programming channels, the competitive video distribution networks being developed will have many times this capacity, thus potentially forcing new entrants to leave a large portion of their capacity lie fallow.[102]

46. *Discussion*. On reconsideration, we decline to modify our decision to enforce channel occupancy limits in systems which face actual head-to-head competition. With respect to Bell Atlantic's argument that channel occupancy limits are even less necessary in markets where competition exists and one of the competitors is a video dialtone service, we cannot find, at this time, that video dialtone will completely eliminate the problems caused by vertical integration. Under video dialtone, a telephone company must provide sufficient capacity to serve multiple video programmers, and must expand capacity as demand increases to the extent technically feasible and economically reasonable. At this point, there are only eight commercially licensed video dialtone services in the country. None of these systems is yet operational; until that time, it is unclear whether a video dialtone system will fully address the concerns raised by channel occupancy limits. In addition, the practical effect of several recent court cases is that certain telephone companies may now provide their own programming to subscribers in their service areas.[103] Thus, we do not believe that video dialtone in its current state can provide sufficient

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[98] MPAA Reply Comments to *Notice of Proposed Rulemaking and Notice of Inquiry* at 9.

[99] *Id.* at 5.

[100] *Id.* at 6.

[101] Bell Atlantic Reply at 2.

[102] For example, Bell Atlantic's proposed video dialtone system in New Jersey will be capable of providing a minimum of 384 channels upon completion. *Id.* at 3.

[103] *Chesapeake & Potomac Tel. Co. of Virginia v. United States*, 42 F.3d 181 (4th Cir. 1994); *US West, Inc. v. United States*, No. 94-35775, D.C. No. CV-93-01523-BJR (9th Cir. Dec. 30, 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. Sept. 23, 1994); *Ameritech Corp. v. United States*, 867 F.Supp. 721 (N.D. Ill. 1994); *NYNEX Corp. v. United States*, Civil No. 93-323-P-C (D. Me. Dec. 8, 1994); *GTE South, Inc. v. United States*, C.A. No. 94-1588-A (E.D. Va. Jan. 13, 1994); *United States Tel. Assoc. v. United States*, Civ. No. 1:94CV01961 (D.D.C. Feb. 14, 1995); *Southwestern Bell v. United States*, No. 3:94-CV-0193-D (N.D. Tex. March 27, 1995). In light of these decisions, on January 20, 1995, the Commission issued a *Fourth Further Notice of Proposed Rulemaking* in CC Docket No. 87-266 (FCC 95-20) to consider changes in its video dialtone rules and to consider the extent to which Title II and Title VI of the Communications Act apply to telephone companies providing video programming directly to subscribers in their telephone service areas over video dialtone facilities.

justification to reconsider our decision to enforce our channel occupancy limits in systems which face actual head-to-head competition.[104]

47. The remaining arguments raised in Bell Atlantic's Petition have already been considered and rejected in our *Second Report and Order*.[105] In the *Second Report and Order*, we concluded that we should not eliminate channel occupancy limits in communities where effective competition exists because we found that the effective competition standard was not adopted for this specific purpose and because it is not clear that the presence of effective competition for any cable system will address all of the relevant concerns that Congress expressed in enacting Section 11 of the 1992 Cable Act.[106] For example, we noted that if a competing multichannel distributor is also vertically integrated, without channel occupancy limits, unaffiliated programming services may continue to be denied access from either outlet, thus frustrating the diversity and competition objectives of the 1992 Act.[107]

48. Finally, we also agree with the point raised by CME that the statutory exemption from regulation for cable systems subject to effective competition is very limited: Congress explicitly stated in the statute that, in systems which faced effective competition, *rate regulation* would not be necessary. Thus, it is reasonable to assume that had Congress intended for *all* cable regulations to be eliminated where systems became subject to actual head-to-head competition, this statutory exemption would have been drafted much more broadly. Nowhere in either the language of Section 11 or its legislative history does it state that the presence of actual head-to-head competition will render the channel occupancy limits unnecessary.

49. We therefore conclude that there is insufficient evidence in the record before us to warrant elimination or modification of our channel occupancy limits in systems that face actual head-to-head competition. However, as we indicated in the *Second Report and Order*, we remain aware that Congress has indicated that a primary objective of the 1992 Act was to rely on the marketplace to the maximum extent possible, and that the legislation was intended to protect consumer interests in the receipt of cable service "where cable television systems are not subject to effective competition."[108] Thus, as competition develops and we gain more experience with the rules, we will further analyze our rules and the industry as a whole to see whether vertical ownership limits should be phased out.

IV. CONCLUSION

50. For the reasons stated above, we deny CME's and Bell Atlantic's petitions for reconsideration. At the present time, we believe that our channel occupancy rules continue to represent an appropriate balance of the various statutory objectives identified by Congress. We will re-examine these rules in the future, however, should it be warranted by new evidence or a change in the cable marketplace.

V. REGULATORY FLEXIBILITY ANALYSIS

51. Pursuant to Sections 601-602 of

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[104] We also note that Bell Atlantic's argument that new multichannel video programming distributors with expanded capacity may be forced to leave channels fallow is irrelevant because our channel occupancy limits do not apply beyond 75 channels.

[105] In the Comments filed in response to our *Further Notice*, operators took essentially the same position as Bell Atlantic and argued for the elimination of the vertical ownership limits in communities where effective competition has been established. MPAA and NATOA opposed eliminating these limits, for basically the same reasons advanced by CME.

[106] 8 FCC Rcd at 8603.

[107] *Id.*

[108] 8 FCC Rcd at 8603.

the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981), the Commission's final analysis is as follows:

52. *Need and Purpose for Action*: This action is being taken to address petitions for reconsideration of the channel occupancy rules adopted by the Commission to implement Section 11(c) of the 1992 Cable Act.

53. *Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis*: There were no comments received in response to the Initial Regulatory Flexibility Analysis.

54. *Significant Alternatives Considered*: We have analyzed the comments submitted in light of our statutory directives and have, to the extent possible, minimized the regulatory burden on entities covered by the ownership provisions of the 1992 Cable Act.

V. ORDERING CLAUSES

55. Accordingly, IT IS HEREBY ORDERED that pursuant to the authority in Sections 1, 4 and 613 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, and 533, the petitions for reconsideration filed in this proceeding by the Center for Media Education/Consumer Federation of America and Bell Atlantic Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

MM DOCKET 92-264

Petitions for Reconsideration of *Second Report and Order* in MM Docket No. 92-264, 8 FCC Rcd 8565 (1993)

Bell Atlantic
Center for Media Education/Consumer Federation of America

Comments/Oppositions to Petitions for Reconsideration

Affiliated Regional Communications, Ltd
Center for Media Education/Consumer Federation of America
Liberty Media Corporation
National Cable Television Association
Tele-Communications, Inc.
Time Warner Entertainment Co., L.P.
Turner Broadcasting System, Inc.
Viacom International, Inc.

Replies to Comments/Oppositions to Petitions for Reconsideration

Bell Atlantic
Black Entertainment Television, Inc.
Center for Media Education/Consumer Federation of America
Liberty Media Corporation
National Cable Television Association
Time Warner Entertainment Co., L.P.
Turner Broadcasting System, Inc.

APPENDIX B

Table 1: TCI Cable Systems

City	State	Subscribers	Channel Capacity*	Minimum Number of Unaffiliated Channels (60% of Activated Channels)	Must Carry**	PEG	Designated Leased Access Capacity***	Local/ Regional Networks****	Activated Channels Remaining for Unaffiliated Programmers	Channels Occupied by Programmers with no Cable Ownership
Athens	GA	22,020	35	21	-8	0	0	-2	11	8
Bloomington	IN	19,580	36	22	-8	0	-3	-2	9	7
Lake Charles	LA	25,418	36	22	-7	0	-3	-2	10	8
Schenectady	NY	30,305	36	22	-5	-1	-3	-2	11	10
Boise	ID	42,435	37	22	-5	0	-4	-2	11	10
Topeka	KS	40,484	37	22	-9	-2	-4	-2	5	9
Ft. Smith	AR	28,392	40	24	-9	-3	-3	-2	7	8
Pueblo	CO	24,783	40	24	-9	0	-4	-2	9	8
Peoria	IL	57,742	41	25	-5	-3	-4	-2	11	8
Wilmington	DE	254,617	54	32	-9	-1	-5	-2	15	11
Ocean City	MD	18,248	54	32	-7	-3	-5	-2	15	11
Taunton	MA	14,214	54	32	-14	-2	-4	-2	10	10
Vacaville	CA	20,368	55	33	-18	-3	-4	-2	6	9
Tyler	TX	30,319	60	36	-9	-1	-4	-2	20	13
Chino	CA	17,393	60	36	-16	-2	-4	-2	12	9

Notes: *May include channels not in use for technical or safety reasons.
**Assumes all broadcast stations on basic tier, except superstations outside a system's ADI, are must carry.
***Assumes leased access set aside filled with leased access programmers.
****Assumes 2 local/regional networks per system.

Source: Television & Cable FACTBOOK, Vol. 62 (1994 ed.)

APPENDIX B

Table 1: TCI Cable Systems

City	State	Maximum Number of Channels Devoted to Affiliated Programming (40% of Activated Channels)	Number of Channels Used by Affiliates* (excluding BET)	Percentage of 40% Limit Actually Filled with Affiliates
Athens	GA	14	9	64%
Bloomington	IN	14	9	64%
Lake Charles	LA	14	11	79%
Schenectady	NY	14	7	50%
Boise	ID	15	10	67%
Topeka	KS	15	7	47%
Ft. Smith	AR	16	9	56%
Pueblo	CO	16	10	63%
Peoria	IL	16	12	75%
Wilmington	DE	22	12	55%
Ocean City	MD	22	11	50%
Taunton	MA	22	9	41%
Vacaville	CA	22	12	55%
Tyler	TX	24	11	46%
Chino	CA	24	12	50%

Note: *Assumes Turner Broadcasting channels are affiliates and C-Span is not (because of its corporate control structure).

Source: Television & Cable FACTBOOK, Vol. 62 (1994 ed.)

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Table 2: TCI Affiliated Program Services

City	State	Action PPV	BET	CNN	Court TV	Discovery	E! Enter-tainment	Encore	Family	Headline News	HSN I & II	Learning
Athens	GA		X	X		X		X	X	X		X
Bloomington	IN		X	X		X		X	X	X		
Lake Charles	LA		X	X	X	X		X	X	X		
Schenectady	NY		X	X		X		X	X	X		
Boise	ID			X		X		X	X	X		
Topeka	KS		X	X		X			X	X		
Ft. Smith	AR			X	X	X		X	X	X		
Pueblo	CO			X	X	X		X	X	X		
Peoria	IL		X	X		X		X	X	X	X	X
Wilmington	DE		X	X	X	X		X	X	X	X	
Ocean City	MD		X	X		X		X	X	X		X
Taunton	MA			X		X		X	X	X	X	
Vacaville	CA	X	X	X		X	X	X		X	X	
Tyler	TX		X	X		X	X	X	X	X		
Chino	CA		X	X		X	X	X	X	X		X

Source: Television & Cable FACTBOOK, Vol. 62 (1994 ed.)

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Table 2: TCI Affiliated Program Services

Table 2: TCI Affiliated Program Services

City	State	Prime Sports	QVC/ QVC Fashion	Request 1 & 2	TBS	TNT
Athens	GA		X		X	X
Bloomington	IN	X	X		X	X
Lake Charles	LA		X	XX	X	X
Schenectady	NY		X			X
Boise	ID	X	X	X	X	X
Topeka	KS		X		X	X
Ft. Smith	AR		X		X	X
Pueblo	CO	X	X		X	X
Peoria	IL		X	XX	X	X
Wilmington	DE		X	XX	X	X
Ocean City	MD		X	XX	X	X
Taunton	MA		X		X	X
Vacaville	CA		X	XX	X	X
Tyler	TX		X	XX	X	X
Chino	CA		X	XX	X	X

Source: Television & Cable FACTBOOK, Vol. 62 (1994 ed.)

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Table 3: Channels on TCI Systems with No Cable Operator Ownership

City	State	A & E	CNBC	Disney	ESPN	EWTN	Faith and Value*	Gala-vision	Lifetime	Nostalgia	Playboy	Prevue	Spice 1&2	Travel
Athens	GA	X	X	X	X		X		X					
Bloomington	IN	X	X	X	X				X					
Lake Charles	LA	X	X	X	X	X	X		X					
Schenectady	NY	X	X	X	X		X		X					
Boise	ID	X	X	X	X		X		X			X		
Topeka	KS	X	X	X	X	X	X		X					
Ft. Smith	AR	X	X	X	X		X		X					
Pueblo	CO		X	X	X	X	X		X					
Peoria	IL	X	X	X	X				X			X		
Wilmington	DE	X	X	X	X		X		X	X		X		
Ocean City	MD	X	X	X	X		X		X	X	X	X		
Taunton	MA	X	X	X	X	X			X			X		
Vacaville	CA	X	X	X	X				X		X	X		X
Tyler	TX	X	X	X	X		X		X		XX	X	X	
Chino	CA	X	X	X	X			X	X		X			

Note: *Formerly VISN/ACTS

Source: Television & Cable FACTBOOK, Vol. 62 (1994 ed.)

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Table 3: Channels on TCI Systems with No Cable Operator Ownership

City	State	Trinity Broad. Network	Univision	Weather	WGN	WPIX	WSBK	WWOR
Athens	GA			X	X			
Bloomington	IN			X	X			
Lake Charles	LA			X				
Schenectady	NY			X		X	X	X
Boise	ID		X	X	X			
Topeka	KS		X	X				
Ft. Smith	AR			X	X			
Pueblo	CO		X	X				
Peoria	IL			X	X			
Wilmington	DE		X	X				X
Ocean City	MD	X		X				
Taunton	MA		X	X				X
Vacaville	CA				X			
Tyler	TX		X	X	X			
Chino	CA			X	X			

Source: Television & Cable FACTBOOK, Vol. 62 (1994 ed.)

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Table 4: Time Warner Cable Systems

City	State	Subscribers	Channel Capacity*	Minimum Number of Unaffiliated Channels (60% of Activated Channels)	Must Carry**	PEG	Designated Leased Access Capacity***	Local/ Regional Networks****	Activated Channels Remaining for Unaffiliated Programmers	Channels Occupied by Programmers with no Cable Ownership
Palm Springs	CA	30,418	61	37	-12	-3	-5	-2	15	10
Nashua	NH	23,175	60	36	-14	0	-5	-2	15	9
Lynn	MA	32,440	52	31	-11	-3	-5	-2	10	11
Austin	TX	178,000	57	34	-6	-3	-6	-2	17	14
Milwaukee	WI	92,592	56	34	-11	-3	-5	-2	13	13
Litchfield	CT	25,000	37	22	-8	-3	-3	-2	6	14
Mankato	MN	15,500	36	22	-9	0	-3	-2	8	7
Albany	NY	63,000	37	22	-5	-3	-4	-2	8	13
Chapel Hill	NC	17,428	42	25	-7	-3	-3	-2	10	8
Akron	OH	96,833	40	24	-10	0	-3	-2	9	5

Notes: *May include channels not in use for technical or safety reasons.
**Assumes all broadcast stations on basic tier, except superstations outside a system's ADI, are must carry.
***Assumes leased access set aside filled with leased access programmers.
****Assumes 2 local/regional networks per system.

Source: Television & Cable FACTBOOK, Vol. 62 (1994 ed.)

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Table 4: Time Warner Cable Systems

Table 4: Time Warner Cable Systems

City	State	Maximum Number of Channels Devoted to Affiliated Programming (40% of Activated Channels)	Number of Channels Used by Affiliates* (excluding BET)	Percentage of 40% Limit Actually Filled with Affiliates
Palm Springs	CA	24	6	25%
Nashua	NH	24	8	33%
Lynn	MA	21	9	43%
Austin	TX	23	10	43%
Milwaukee	WI	22	9	41%
Litchfield	CT	15	6	40%
Mankato	MN	14	6	43%
Albany	NY	15	8	53%
Chapel Hill	NC	17	5	29%
Akron	OH	16	7	44%

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Note: *Assumes Turner Broadcasting channels are affiliates and C-Span is not (because of its corporate control structure).

Source: Television & Cable FACTBOOK, Vol. 62 (1994 ed.)

Table 5: Time Warner Affiliated Program Services

City	State	Action PPV	BET	Cinemax	CNN	Comedy Central	Court TV	E! Enter-tainment	HBO	Headline News	TBS	TNT	Viewers Choice I &/or II
Palm Springs	CA			X	X				X	X		X	X
Nashua	NH	X		X	X	X			X	X	X	X	
Lynn	MA			X	X	X			X	X	X	X	X X
Austin	TX		X	X	X	X	X	X	X	X	X	X	X
Milwaukee	WI		X	X	X	X	X	X	X	X	X	X	
Litchfield	CT			X	X				X			X	X X
Mankato	MN			X	X				X	X	X	X	
Albany	NY		X	X	X	X			X	X	X	X	X
Chapel Hill	NC			X	X				X	X	X		
Akron	OH		X	X	X				X	X	X	X	X

Source: Television & Cable FACTBOOK, Vol. 62 (1994 ed.)

Table 6: Channels on Time Warner Systems with No Cable Operator Ownership

Table 6: Channels on Time Warner Systems with No Cable Operator Ownership

City	State	Am. Disabl. Channel	A & E	CNBC	Disney	ESPN	EWTN	Faith and Value*	Lifetime	National Jewish TV	Playboy	Prevue Channel	Reuters News View	Spice	Travel Channel
Palm Springs	CA		X	X	X	X	X	X	X	X	X			X	
Nashua	NH		X		X	X	X		X		X	X			
Lynn	MA		X	X	X	X			X			X	X		
Austin	TX	X	X	X	X	X		X	X		XX	X			
Milwaukee	WI		X	X	X	X	X		X		X	X			X
Litchfield	CT		X	X	X	X	X		X		X	X			X
Mankato	MN		X		X	X	X		X						
Albany	NY	X	X	X	X	X			X	X		X			X
Chapel Hill	NC		X	X	X	X			X					X	
Akron	OH		X	X	X	X			X						

Note: *Formerly VISN/ACTS

Source: Television & Cable FACTBOOK, Vol. 62 (1994 ed.)

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Table 6: Channels on Time Warner Systems with No Cable Operator Ownership

City	State	Weather Channel	Trinity Broad. Network	Uni-vision	WGN	WPIX	WSBK	WWOR
Palm Springs	CA							
Nashua	NH	X				X		
Lynn	MA	X		X		X		X
Austin	TX	X	X	X	X			
Milwaukee	WI	X		X	X			X
Litchfield	CT	X	X			X	X	X
Mankato	MN	X			X			
Albany	NY	X				X	X	X
Chapel Hill	NC	X						X
Akron	OH							

Source: Television & Cable FACTBOOK,

Vol. 62 (1994 ed.)

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FCC 95-196

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	MM Docket No. 92-266
Cable Television Consumer Protection	)	
and Competition Act of 1992: Rate Regulation	)	MM Docket No. 93-215
	)	

SIXTH REPORT AND ORDER AND ELEVENTH ORDER ON RECONSIDERATION

Adopted: May 5, 1995 Released: June 5, 1995

By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. In this *Sixth Report and Order and Eleventh Order on Reconsideration* we amend our definitions of small cable entities to encompass a broader range of cable systems that will be eligible for special rate and administrative treatment. In addition to amending our definitions, we make available to this expanded category a new regulatory scheme that will be available immediately for use by certain small cable companies. This new form of regulation should provide both rate relief and reduced administrative burdens.

II. SUMMARY

2. In amending our definitions and introducing a new, simplified form of small system rate relief, the Commission continues its ongoing efforts to offer small cable companies administrative relief from rate regulation in furtherance of congressional intent. In each of the orders that we have adopted in this rate proceeding, small cable companies have been afforded flexibility in how they can comply with rate regulations while reducing burdens on themselves and providing good service to subscribers. Through our actions today, the Commission expands the category of systems eligible for such opportunities to include approximately 66% of all cable systems in the nation serving approximately 12.1% of all cable subscribers.

3. Specifically, we amend our definitions so that systems serving 15,000 or fewer

subscribers that are owned by small cable companies of 400,000 or fewer subscribers are eligible to elect small system cost-of-service relief, as well as certain other relief previously made available to small systems and small operators. The new cost-of-service approach will involve a very simple, five element calculation based upon a system's costs. The calculation will produce a per channel rate for regulated services that will be presumed reasonable if it is no higher than $1.24 per channel. If the formula generates a higher rate, the operator still will be permitted to charge that rate if not challenged by the franchising authority or, upon being challenged, if the operator meets its burden of proving that the rate is reasonable. This new regulation will accord these small systems substantial flexibility in establishing the types of costs to be included and in allocating those costs among services. Our analysis of cost data, when combined with our understanding of the many unique challenges facing small cable companies, leads us to conclude that a simplified approach will best serve a segment of the cable industry that needs assistance in coping with rate regulation in order to serve subscribers better and to grow its business. In addition, this approach should facilitate regulation of cable rates by small local franchising authorities who wish to have a procedure for doing so that is simpler than existing forms of regulation.

III. BACKGROUND

4. The Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act") requires the Commission to reduce regulatory burdens and the cost of compliance for small systems.[1] Pursuant to that mandate, the Commission introduced small system relief beginning with the initial *Report and Order and Further Notice of Proposed Rulemaking ("Rate Order")*, in which it allowed certified local franchising authorities to permit these small systems to simply certify that basic service and equipment rates are reasonable.[2] This exempts small systems from having to file initial rate justification forms after becoming subject to regulation. We adopted this approach in recognition of the fact that franchising authorities are in the best position to weigh the costs of a formal rate review against the beneficial impact that such a review might have on basic service rates. Small systems also were exempt from rate regulation for more than six months while the Commission considered additional proposals for small system treatment.[3]

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[1] 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. §§ 534, 543(i). The 1992 Cable Act amends Title 6 of the Communications Act, as amended, 47 U.S.C. § 521 et seq. ("Communications Act"); *see* 47 C.F.R. § 76.901(c).

[2] *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5921 (1993); 47 C.F.R. § 76.934(a).

[3] *Memorandum Opinion and Order*, MM Docket No. 92-266, FCC 93-389, 8 FCC Rcd 5585 (1993). We addressed these proposals in a previous rulemaking. *See Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking ("Second Reconsideration Order")*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994).

5. Concurrent with lifting the stay of rate regulation in May 1994, and subsequently, the Commission has introduced several additional measures to assist small cable companies. First, we provided regulatory relief to a larger number of small cable companies than the Commission did initially, and we created special rate rules applicable to these classes of operators.[4]

6. We adopted these alternative rules and definitions based upon information in the record that raised a legitimate question about the impact of rate regulation on smaller operators. In addition, evidence submitted by petitioners suggested that small systems face higher than average costs. We expressed concern that some small operators that did not meet the statutory definition of a small system might nonetheless lack the administrative and financial resources necessary to fully comply with rate regulation. Thus, we defined "small operators" as those operators with a total subscriber base of 15,000 or fewer subscribers that are not affiliated with or controlled by larger operators.[5] We concluded that a small operator would be affiliated with or controlled by a larger company if that company holds a 20% equity interest (active or passive) or exercises *de jure* control, such as through a general partnership or majority voting shareholder interest.[6] The Commission created this affiliate limitation because our concerns about small operators were limited to those companies that do not have access to the financial resources or other purchasing discounts available to larger companies.[7]

7. These concerns led us to conclude that certain aspects of our rate and administrative relief should be made available only to independent small systems and those owned by small multiple system operators ("small MSOs"). We defined a small MSO as one with 250,000 or fewer total subscribers that owns only systems with fewer than 10,000, and has an average system size of 1,000 or fewer subscribers.[8] We stated that the 250,000 subscriber cap would ensure that larger MSOs do not benefit from administrative or rate relief that they do not need because they are likely to have the resources necessary to comply fully with the rate regulation. We also indicated that the 10,000 and 1,000 subscriber limits helped to tailor relief to those operators most likely to own numerous small systems.[9]

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[4] *Second Reconsideration Order*, 9 FCC Rcd at 4172-83, 4218-33.

[5] 47 C.F.R. § 76.922(b)(4)(i)(A).

[6] *Second Reconsideration Order*, 9 FCC Rcd at 4173-74, n. 157; 47 C.F.R. § 76.922(b)(4)(i)(B).

[7] *Second Reconsideration Order*, 9 FCC Rcd at 4173-74.

[8] 47 C.F.R. § 76.922(b)(5)(i).

[9] *Second Reconsideration Order*, 9 FCC Rcd at 4225-26.

8. For small operators and independent small systems, the Commission created transition relief rate rules, exempting those operators and systems from the requirement that initial regulated rates be based on a 17% competitive rate reduction from September 30, 1992 levels.[10] Rather, these systems may maintain their March 31, 1994 rates, with certain adjustments as determined under FCC Form 1200.[11] These adjustments allow operators electing transition relief to increase their rates on a quarterly basis to reflect changes in permitted external costs and channel adjustments.[12] Furthermore, small operators and independent small systems that elect transition relief also may recover inflation increases that have occurred since September 30, 1992.[13] The Commission stated that transition relief would be available to qualifying operators pending analysis of cost data from small operators and low-price systems.

9. Systems electing transition relief must unbundle programming service charges from equipment charges when establishing initial regulated rates. However, an operator that owns more than one small system may establish its unbundled charges for regulated equipment based on the average equipment costs of all its small systems, or only some of them, rather than on a system-by-system basis.[14] We made this relief available to all MSOs, regardless of their total subscriber base. Our rules also permit independent small systems and those owned by small MSOs to elect streamlined rate reductions under which they reduce each billed item of regulated cable service as of March 31, 1994 by 14% instead of setting rates based on 17% competitive rate reductions from September 30, 1992 levels.[15] Streamlined rate reductions reduce administrative burdens by eliminating the need for these small systems to complete FCC Forms 1200 and 1205, and by eliminating the requirements to unbundle equipment and installation charges from programming service charges, and to set equipment and installation charges at actual cost. Independent small systems and small systems owned by small MSOs also may use simplified forms if they elect to use the interim cost-of-service approach to justify initial regulated rates, thus reducing the amount of

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[10] 47 C.F.R. § 76.922(b)(4)(i)(C).

[11] *Id.* Low-price systems also are eligible for transition treatment. Low-price systems are those (1) whose March 31, 1994 rate is below their March 31, 1994 benchmark rate or (2) whose March 31, 1994 rate is above their March 31, 1994 benchmark rate, but whose March 31, 1994 full reduction rate is below their March 31, 1994 benchmark rate, as determined under FCC Form 1200. 47 C.F.R. § 76.922(b)(4)(ii).

[12] 47 C.F.R. § 76.922(b)(4)(i)(C).

[13] *Ninth Order on Reconsideration*, MM Docket No. 92-266, FCC 95-43, 60 Fed. Reg. 10512 (February 27, 1995); to be codified at 47 C.F.R. § 76.922(d)(2).

[14] 47 C.F.R. § 76.923(l).

[15] 47 C.F.R. § 76.922(b)(5)(ii).

information that the system must submit to justify higher rates.[16]

10. Regardless of the approach taken to establish initial regulated rates, small operators are given a "grace period" of 60 days after regulation begins in which to complete and to file rate justifications and to notify subscribers of the new rates.[17] All other operators must complete these tasks within 30 days of the date of initial regulation. Additionally, small operators have 90 days from the initial date of regulation in which to implement restructured rates, unlike all other operators who face up to a year of refund liability. A small operator also may make its initial basic tier rates effective on 30 days' notice without prior approval from the franchising authority, although the operator remains subject to refund liability.[18] With regard to regulatory fees, the Commission has provided an assessment formula that is based upon an exact subscriber count.[19] Thus, for example, a system with 100 subscribers does not have to pay the same regulatory fee as a system with 1,000 subscribers. This approach relieves all smaller cable systems of bearing a disproportionate burden of the aggregate cable service regulatory fee imposed upon the industry as a whole.

11. Our going forward rules provide cable operators generally with incentives to add new programming, but also specifically give qualifying small systems an opportunity to recover headend costs associated with adding new channels and providing better service to subscribers. Under the going forward rules, all operators may introduce New Product Tiers, which they are permitted to price as they elect.[20] They also may add new channels to cable programming service tiers ("CPSTs") and recover a flat mark-up fee plus license fees, subject to certain restrictions.[21] However, small systems that are independent or are owned by small MSOs may recover the flat mark-up fee for new channels, plus the actual cost of the headend equipment necessary to add new channels, not to exceed $5,000 per channel,

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[16] *See Report and Order and Further Notice of Proposed Rulemaking ("Cost Order")*, MM Docket No. 93-215, FCC 94-39, 9 FCC Rcd 4527, 4668-72 (1994).

[17] *Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking* ("*Fifth Order on Reconsideration*" or "*Further Notice of Proposed Rulemaking*"), MM Docket Nos. 93-215 & 93-266, 9 FCC Rcd 5327 (1994); 47 C.F.R. § 76.934(e).

[18] *Id.*

[19] *See Report and Order,* MD Docket No. 94-19, FCC 94-140, 9 FCC Rcd 5333, 5368 (1994).

[20] *See Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking ("Sixth Reconsideration Order"*), MM Docket Nos. 92-266 & 93-215, FCC 94-286, summarized at 59 Fed. Reg. 62614 (December 6, 1994); to be codified at 47 C.F.R. § 76.987.

[21] *Id.*, to be codified at 47 C.F.R. §§ 76.922(d)(3)(x), (d)(3)(xi), and (e).

plus the channel's licensing fee, if any, for adding not more than seven new channels to regulated service tiers over the next three years.[22] The cost of the headend equipment must be amortized over the useful life of the equipment and qualifying systems will be allowed an 11.25% return on the undepreciated investment.[23] This dual recovery for the addition of channels is also available to larger systems that are independent or are owned by small MSOs if the monthly per subscriber cost of the additional headend equipment necessary to receive an additional channel is one cent or more.[24]

12. Finally, the Commission has permitted independent small systems, small systems owned by small MSOs, and certified local franchising authorities to create alternative rate regulation agreements.[25] Through these agreements, the parties negotiate directly with each other to determine reasonable rates for basic service and cable programming service tiers.[26] The agreements also may include provisions relating to rate increases and network upgrades. The agreements do not have to be based on the Commission's rules or forms, but must take into account the regulatory criteria of the 1992 Cable Act, and they must ensure that participating systems will not be required to charge rates lower than would be permitted by our benchmark rules.[27] This approach provides for regulation of rates but relieves the parties of administrative burdens that sometimes may accompany implementation of our rules. Alternative rate regulation agreements also offer regulatory certainty to the parties, who are able to agree in advance to initial and future rates, as well as plans for network upgrades. In turn, this regulatory certainty may assist small systems in obtaining financial assistance needed to upgrade their networks and provide better service to subscribers.

13. We released the *Further Notice of Proposed Rulemaking* that gives rise to this *Order* for two reasons. First, in the course of adopting the relief described above, we stated that several of these measures might be modified or terminated following completion of our cost studies.[28] Before completing those studies and adopting final rate rules, we believed we should seek comment on possible alternative definitions of small systems and small operators,

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[22] *Id.*, to be codified at 47 C.F.R. § 76.922(e)(7).

[23] *Id.*

[24] *Id.*

[25] *See Eighth Order on Reconsideration*, MM Docket Nos. 92-266 & 93-215, FCC 95-42, 60 Fed. Reg. 14373 (March 17, 1995).

[26] *Id.*, to be codified at 47 C.F.R. § 76.934(f).

[27] *Id.*

[28] *See Second Reconsideration Order*, 9 FCC Rcd at 4178 (transition relief); *id.*, 9 FCC Rcd at 4223 (streamlined rate reductions).

rather than restricting ourselves to the existing definitions.[29]

14. A second issue, raised earlier in this docket by two commenters, concerns the applicability of the Small Business Act.[30] In 1992, Congress amended Section 3(a) of the Small Business Act to require federal agencies to use small business definitions created by the Small Business Administration ("SBA"), or in the alternative, to seek public comment on different definitions and obtain the approval of the Small Business Administrator with regard to any regulation applicable to small businesses, unless other statutory definitions apply.[31] SBA rules currently define a small cable company as one with $11 million or less in gross revenues.[32] The SBA's Office of Advocacy and the Small Cable Business Association ("SCBA") believe the current definitions in our rules defining eligibility for transition and administrative relief are underinclusive and were promulgated in violation of Section 3(a) of the Small Business Act.[33] They urged us to re-evaluate the definitions and seek public input before deciding on permanent standards. Although we did not concur in these commenters' construction of the Small Business Act, we agreed that additional comment on existing and alternative definitions of small cable systems and small cable companies would aid our efforts to relieve deserving systems and companies of regulatory burdens.[34]

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[29] *Further Notice of Proposed Rulemaking*, 9 FCC Rcd at 5330.

[30] *See Small Business Credit and Business Opportunity Enhancement Act*, Pub. L. No. 102-366, § 222, 106 Stat. 986, 999 (1992).

[31] 15 U.S.C. § 632(a).

[32] 59 Fed. Reg. 16513 (April 7, 1994). This SBA definition became effective after the Commission adopted and released its rules establishing transition relief for small operators. The Commission's *Second Reconsideration Order* was adopted February 22, 1994 and released March 30, 1994. The SBA's revised definitions were adopted April 7, 1994 and became effective April 22, 1994. The Commission's rules were published in the Federal Register on April 15, 1994 and became effective May 15, 1994. Previously, the SBA defined a small cable company as one with $7.5 million or less in gross revenues. 13 C.F.R. 121.601 (1993) (subsequently revised).

[33] *See Reply Comments of the Chief Counsel for Advocacy of the United States Small Business Administration on the Further Notice of Proposed Rulemaking* in MM Docket No. 93-215, submitted July 28, 1994; SCBA *Reply Comments to the Fifth Notice of Proposed Rulemaking* in MM Docket No. 92-266, submitted July 27, 1994. SCBA also has filed an intervenors' brief in a lawsuit challenging the Commission's cable rate regulations. *See* Brief of Intervenor Small Cable Business Association in *Time Warner Entertainment Co., L.P. v. Federal Communications Commission*, No. 93-1723 (D.C. Cir.).

[34] *Further Notice of Proposed Rulemaking*, 9 FCC Rcd at 5330, n. 30.

15. Accordingly, we issued the *Further Notice of Proposed Rulemaking* seeking to establish a more complete record for purposes of promulgating final rate rules applicable to small operators, independent small systems, and small systems owned by small MSOs by soliciting comment on possible alternative definitions that we could use for purposes of determining eligibility for special rate or administrative treatment.[35] We sought comment on whether we should retain current definitions or use different definitions for purposes of establishing special rate or administrative treatment for small systems and small operators. We specifically sought comment on these issues in light of Section 3(a) of the Small Business Act, and on whether we should employ the current SBA definition of a small cable company in our cable rules.

III. COMMENTS

16. Commenters generally assert that the Commission should act quickly to adopt revised definitions. They point to a number of industry changes that have occurred since passage of the 1992 Cable Act, including consolidation of ownership and the development of potential competition from other sources of video programming.[36] The Cable Telecommunications Association ("CATA") warns that these changes, when combined with current regulatory treatment, could result in some smaller operators discontinuing service to communities.[37] CATA states that unless a broader range of smaller cable operators are provided with additional rate relief, these "small communities will be relegated to no service or to limited service from other multi-channel providers . . . who are unfettered by regulation and have no obligation to serve" some communities.[38]

17. Commenters note that for smaller operators facing regulation, as well as franchise demands to provide certain community services, time and expertise needed to analyze and comply with existing rules are in short supply. According to Avenue Cable TV, et al. ("Avenue"), smaller operators have too few subscribers to generate the revenues sufficient to cover the expense of hiring enough employees to comply with existing rules, or to retain outside legal and accounting expertise.[39] Commenters also contend that existing special rate rules for small systems and small operators do not properly reflect the unique business environments in which they operate. For example, Avenue and Cole point out that small operators do not qualify for programming and equipment discounts due to the low

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[35] *See Fifth Order on Reconsideration*, 9 FCC Rcd at 5329.

[36] *See* Joint Comments of Cable Operators ("Cole") at 4-5.

[37] *See* CATA Comments at 8.

[38] *Id.*

[39] *See* Avenue Comments at 4; *see also* CATA Comments at 5.

number of subscribers that they serve.[40] Inability to qualify for these discounts often results in smaller operators using older equipment that is costly to maintain. At the same time, commenters observe that a smaller system serving a large rural area faces increased construction costs due to the increased amount of cable that must be installed to reach the entire area and increased operating costs given the greater amount of facilities that must be maintained.[41] Commenters are unopposed in their conclusion that these factors, along with other economic realities (e.g., lower-income subscribers to whom many small systems and small operators provide service), constrain their ability to recover all of their costs or to increase revenue through local advertising or by offering new services.[42]

18. Commenters contend that these unique business factors have a negative financial impact upon a far broader cross-section of cable companies than those small systems, small operators, and small MSOs currently eligible to take advantage of existing rate and administrative relief. In turn, they suggest that ineligibility for special rate relief makes it difficult for some of those small cable operators to attract capital necessary to upgrade their systems and to provide better service to their subscribers.[43] While commenters unanimously agree that the Commission should broaden the definitions of small systems and small operators, the definitions they suggest vary widely, ranging from defining a small system as one with 3,500 or fewer subscribers to defining a small cable company as one with $100 million or less in annual regulated revenues or $40 million or less in annual gross revenues.[44] In addition, some parties urge the Commission to amend the small system definition so that it is based upon the number of subscribers in the franchise area served, rather than the number of subscribers served by a common, principal headend as currently defined.[45] Commenters also stated all small systems should be allowed to take advantage of regulatory relief, regardless of their affiliation with a larger company.[46]

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[40] *See* Avenue Comments at 9; Cole Comments at 6.

[41] *See* Avenue Comments at 4-5.

[42] *See* National Cable Television Association ("NCTA") Comments at 11.

[43] *See* Avenue Comments at 8.

[44] *See* CATA Comments at 5; NCTA Comments at 19, 22; Small Cable Business Association ("SCBA") Comments at 20-21; Small Business Administration's Office of Advocacy ("SBA") Comments at 5-8. In comments, Avenue encouraged the Commission to define a small cable company as one earning $25 million or less in annual gross revenue. Avenue Comments at 2. However, in its reply comments, Avenue switched to support definitions proposed by NCTA. Avenue Reply Comments at 3.

[45] *See* SCBA Comments at 26; NCTA Comments at 13; CATA Comments at 9.

[46] CATA Comments at 6-7; SCBA Comments at 26; NCTA Comments at 7.

19. The National Cable Television Association ("NCTA"), SCBA, and the SBA's Office of Advocacy all support defining a small cable company as one that earns $100 million or less in annual regulated revenues.[47] These commenters note that the Commission has used $100 million in annual regulated revenue as a tool in common carrier regulation to distinguish between large and small local exchange carriers.[48] Small local exchange carriers (i.e., those earning less than $100 million in annual regulated revenues) enjoy relaxed regulation of their tariffs and exemption from other requirements. For example, small local exchange carriers are not required to file annual and quarterly financial and traffic reports that large local exchange carriers must file, and they are exempt from the Commission's expanded interconnection requirements.[49]

20. The Commission adopted relaxed requirements for small local exchange carriers because they generally do not have the financial and administrative resources to comply with all aspects of common carrier regulation. NCTA, SCBA, and SBA's Office of Advocacy contend that small cable companies earning $100 million or less in annual regulated revenue are at the same disadvantage within the context of cable regulation.[50] Therefore, they urge the Commission to expand upon our current definitions by defining a small cable company as one with $100 million or less in annual regulated revenue, and by providing this category with relief in the final rules which we adopt in this proceeding.[51]

21. In the alternative, NCTA, SCBA, SBA's Office of Advocacy, and the National Telephone Cooperative Association encourage the Commission to look to more recent proceedings in the personal communications services ("PCS") docket, and, at a minimum, to define a small cable company as one earning $40 million or less in gross annual revenue.[52] SCBA notes that in the *Second Reconsideration Order*, the Commission recognized that the size of a cable operator influences its ability to attract capital.[53] We reached a similar conclusion in the *Broadband PCS Order*, where we determined that companies earning $40

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[47] NCTA Comments at 19; SCBA Comments at 20, 25; SBA Comments at 5.

[48] *See* 47 C.F.R. §§ 32.11(a), (e).

[49] See 47 C.F.R. §§ 43.21, 43.22, 64.1401(a).

[50] NCTA Comments at 21; SCBA Comments at 20; SBA Comments at 5-8.

[51] *Id.*

[52] NCTA Comments at 22; SCBA Comments at 9; SBA Comments at 8; National Telephone Cooperative Association Reply Comments at 4. As an alternative to revenue- and subscriber-based definitions, SCBA also proposes special modified benchmark treatment for all systems not affiliated with the top 25 cable MSOs.

[53] SCBA Comments at 21; *see Second Reconsideration Order*, 9 FCC Rcd at 4174.

million or less in annual gross revenue would have difficulty obtaining the capital necessary to enter the nascent PCS industry, and we therefore adopted specific measures designed to aid these smaller PCS companies.[54] NCTA, SCBA, and SBA contend that the challenges facing smaller companies in the PCS market are the same that confront smaller cable companies.[55] SCBA states that cable operators with annual revenues of less than $40 million should qualify "without question" as small operators eligible for special treatment.[56]

22. Some other commenters offered subscriber-based definitions that, in some instances, are analogous to revenue-based definitions. For example, Cole argues that a small cable company should be defined as one serving 400,000 or fewer subscribers.[57] Cole contends that such a definition would preclude the top 30 MSOs from being eligible for regulatory relief, because the top 30 MSOs each serve more than 400,000 subscribers; combined they serve approximately 85% of the nation's 55 million cable subscribers.[58] Cole asserts that large local exchange carriers (i.e., those earning more than $100 million in annual regulated revenue) serve 85% of the nation's telephone customers. According to Cole: "Applying the telephone company standard to the cable industry would make possible the continued existence of the independently owned cable businesses that have been the pioneers and backbone of the cable industry."[59] SBA's Office of Advocacy, while clearly preferring a revenue-based definition as discussed above, suggests that defining a small cable company as one serving 100,000 or fewer subscribers, similar to the rural telephone company definition adopted in the PCS proceedings, also could serve to make regulatory

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[54] *Fifth Report and Order*, PP Docket No. 93-253, FCC 94-178, 9 FCC Rcd 5532, 5608 (1994).

[55] NCTA Comments at 22; SCBA Comments at 9; SBA Comments at 8; National Telephone Cooperative Association Reply Comments at 4.

[56] SCBA Comments at 21.

[57] Cole Comments at 9, n. 11.

[58] *Id.*

[59] Cole Comments at 9. Alternatively, Cole suggests defining a small cable company as one with 250,000 or fewer subscribers. Cole Comments at 10. Cole notes that the Commission used a 250,000 subscriber-based standard to define a small MSO in the *Second Reconsideration Order*. *See Second Reconsideration Order*, 9 FCC Rcd at 4225. While Cole agrees that companies with 250,000 or fewer subscribers are not equipped financially or administratively to cope fully with the Commission's regulations, it urges the Commission to rescind the other limiting factors currently contained in the small MSO definition. Cole Comments at 10. Further, Cole argues that systems with 5,000 or fewer subscribers should be accorded total deregulation to the maximum extent permitted by law. Cole Comments at 12-13.

relief available to a significant number of cable operators.[60] Interestingly, SBA's Office of Advocacy does not support adoption of SBA's own definition of a small cable company, a viewpoint generally shared by other commenters.[61] SBA defines a small cable company as one that earns $11 million or less in annual gross revenues.[62] SBA's Office of Advocacy notes parallels between the telephone and cable industries and believes the Commission should look to the regulation of telephony as model for developing size standards appropriate for the cable industry, rather than rely on SBA standards used to determine eligibility for loans.[63]

23. CATA generally argues against a revenue-based definition because it believes that such a definition would "ignore the reality of the community-based cable business which must be self-supporting and profitable if they are to survive."[64] CATA notes, however, that should the "Commission determine that a gross revenue figure is appropriate for some purposes, CATA would support the National Cable Television Association's (NCTA) filing in this proceeding."[65] CATA suggests a small system be defined as one with 3,500 or fewer subscribers, noting that the Commission currently uses this subscriber-based standard to determine when systems must provide local origination and public, educational and government access channels.[66] CATA further states that at about the 3,500 subscriber mark, systems begin to generate the revenue necessary to support these services.[67]

24. Finally, almost all commenters argue that the Commission should not preclude a small system from regulatory relief based upon its affiliation with an MSO. They also urge the Commission to define a small system based upon the number of subscribers it serves in a franchise area, rather than from a system's principal headend. NCTA argues that Congress intended the Commission to provide relief to all small systems of 1,000 or fewer subscribers without regard to the size of the company that owns them.[68] According to

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[60] SBA Comments at 9.

[61] SBA Comments at 5, n. 5. *See also* SCBA Comments at 8-9.

[62] 13 C.F.R. § 121.601.

[63] SBA Comments at 4-5.

[64] CATA comments at 2.

[65] CATA Comments at 2.

[66] CATA Comments at 5. *See* 47 C.F.R. § 76.702.

[67] CATA Comments at 5.

[68] *See* NCTA Comments at 8. *See also* SCBA Comments at 26.

CATA, the "problems faced by small systems are the same, regardless of whether they are owned by a large company. The advantage of large company ownership may be that some programming is less expensive or that some equipment can be purchased in bulk, but surely that savings alone (where it exists) cannot begin to justify ignoring the basic mathematics that dictates that fixed costs spread over fewer subscribers produces less revenue."[69] With regard to the basis for defining a small system, SCBA argues: "Although the Commission chose to adhere to its historic definition of what constitutes a system, it created a compliance system that is based on a different measure - franchise areas. The Commission needs to resolve the conflict by either requiring compliance only on a system level or by determining small system qualification on a franchise area by franchise area basis."[70]

V. DISCUSSION

A. The New Category Of Systems and Operators Eligible for Relief

25. We acknowledge that a large number of smaller cable operators face difficult challenges in attempting simultaneously to provide good service to subscribers, to charge reasonable rates, to upgrade networks, and to prepare for potential competition. Since passage of the 1992 Cable Act, the Commission has worked continuously with the small cable industry to learn more about their legitimate business needs and how our rate regulations might better enable them to provide good service to subscribers while charging reasonable rates. Based on the record in this proceeding and our analysis of the rate justifications that have been submitted since our revised rate rules became effective in May 1994, we conclude that our definitions of small operators and small MSOs need to be changed to encompass the broader range of operators in need of rate relief. Therefore, we will expand upon the definition of a small system to include any system that serves 15,000 or fewer subscribers. Furthermore, we significantly expand upon the definition of a small operator, redefining it and renaming it as a "small cable company" serving a total of 400,000 or fewer subscribers over all of its systems. Finally, we will eliminate the existing definitions of a small operator and small MSO. We will extend to the expanded category of small systems owned by small cable companies certain rate and administrative relief as discussed below, and also the small system rate relief provisions adopted in the accompanying *Eleventh Order on Reconsideration*.

26. In the 1992 Cable Act and its legislative history, Congress made clear its belief that small systems would be in need of administrative and rate relief as a consequence

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[69] CATA Comments at 7.

[70] SCBA Comments at 28.

of the re-regulation of the cable industry.[71] We are convinced, however, that systems of up to 15,000 subscribers are likewise in need of relief and that we have the authority to extend relief to them. As more fully explained below, the comments in this proceeding and our review of benchmark and cost-of-service rate justifications leads us to conclude that these larger systems generally face many of the same challenges that systems of 1,000 or fewer subscribers do in providing cable service. In view of this finding, we believe the relaxation of certain rate rules that we hereby order is consistent with the 1992 Cable Act. We note in particular the Statement of Policy contained in the statute in which Congress expressed its intent, inter alia, to:

> (1) promote the availability to the public of a diversity of views and information through cable television . . .;
> (2) rely on the marketplace, to the maximum extent feasible, to achieve that availability;
> (3) ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems . . . .[72]

Relaxing regulatory burdens should free up resources that affected operators currently devote to complying with existing regulations and should enhance those operators' ability to attract capital, thus enabling them to achieve the goals of Congress cited above. Moreover, in prescribing rules governing basic service rates, the Communications Act requires us to "seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission . . . ."[73] We believe this mandate authorizes us to expand the category of small systems and provide them with rate and administrative relief. Section 303(r) of the Communications Act further supports our decision to take Congress's goals into account in extending relief to systems with up to 15,000 subscribers.[74] The action we take today should also ease burdens for local franchising authorities and the Commission, in furtherance of congressional intent. In particular, as we simplify matters for smaller cable companies, we do the same for smaller local franchising authorities, who we understand to be just as concerned as smaller cable operators with the potential burdens and costs of regulation.

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[71] Communications Act, § 623(i), 47 U.S.C. § 543(i). To the extent we refer herein to systems of up to 15,000 subscribers as "small systems," we do so for purposes of convenience. We are not using that term to refer to the class of systems described in Section 623(i) of the Communications Act.

[72] 1992 Cable Act, § 2(b)(1)-(3).

[73] Communications Act, § 623(b)(2)(A), 47 U.S.C. § 543(b)(2)(A).

[74] Section 303(r) of the Communications Act provides that the Commission may "[m]ake such rules and regulations and prescribe such restrictions and conditions, . . . as may be necessary to carry out the provisions of" the Communications Act. 47 U.S.C. § 303(r).

27. The staff evaluated the 15,000 subscriber standard on the basis of shared economic, physical, and financial characteristics for systems above and below this size, in order to determine the significance of that breakpoint. To evaluate this standard, the staff used data from Warren Publishing Inc.'s cable services database, which was obtained by the Commission in the fall of 1994. This database contains detailed information on most of the country's 11,200 cable systems and 1,500 cable companies. Staff determined that systems with fewer than 15,000 subscribers differ from systems with more than 15,000 subscribers with respect to the following characteristics:

a) the average monthly regulated revenue per channel per subscriber is $0.86 for systems with fewer than 15,000 subscribers and $0.44 for systems with more than 15,000 subscribers;

b) the average number of subscribers per mile is 35.3 for systems with fewer than 15,000 subscribers and 68.7 for systems with more than 15,000 subscribers;

c) the average annual premium revenue per subscriber is $41.00 for systems with fewer than 15,000 subscribers and $73.13 for systems with more than 15,000 subscribers.

This confirms that the use of the 15,000 subscriber standard does result in two groups of systems that have significant distinctions between them.

28. As we have observed previously, our relief for smaller cable entities is aimed at those that do not have access to the financial resources, purchasing discounts, and other efficiencies of larger companies.[75] Therefore, relief will be available only to small systems, as now defined, that are owned by small cable companies serving 400,000 or fewer subscribers over all of its systems. In defining a small cable company as one serving no more than 400,000 subscribers, we accepted the recommendations of commenters who urged that we define a small cable company as one that earns $100 million or less in annual regulated revenues. As explained below, establishing the company size in terms of subscribers, rather than dollars, will advance regulatory simplicity; in the cable context, $100 million in annual regulated revenues equates to approximately 400,000 subscribers.

29. With respect to the $100 million standard, we note in particular the recommendation of this measure of company size by SBA's Office of Advocacy. As it and other commenters point out, in the common carrier field entities having annual regulated revenues of more than $100 million are subject to much greater regulatory burdens than those earning less than that amount. For example, for various regulatory purposes the

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[75] *Second Reconsideration Order*, 9 FCC Rcd at 4173 & n. 157

Common Carrier Bureau has created the Tier 1 category of local exchange carriers ("LECs"), consisting solely of LECs with at least $100 million in annual regulated revenues.[76] In expanding LEC interconnection requirements, we limited the impact of our rules to Tier 1 LECs, citing the limited resources of smaller LECs, among other factors.[77] Numerous common carrier reporting requirements apply solely to carriers having annual revenues in excess of $100 million.[78] Likewise, the level of detail required under the Uniform System of Accounts applicable to telecommunications companies depends upon whether the regulated entity is a Class A or Class B company, the former having annual regulated revenues of $100 million or more and the latter having annual regulated revenues below that amount.[79]

30. As SBA's Office of Advocacy states, the logic underlying these common carrier rules also can be applied in the cable context. Cable companies exceeding the $100 million standard are better able to absorb the costs and burdens of regulation due to their expanded administrative and technical resources. Further, we have noted in the telephone context that relaxation of regulatory burdens is justified for smaller entities even when those entities have significant market power.[80] Accordingly, we believe that $100 million in annual regulated revenues is a reasonable standard at which to decrease regulatory burdens.

31. A cable company with an overall subscriber figure of 400,000 we have chosen is roughly equivalent to a cable company with $100 million in annual revenues. To establish this equivalency, the Commission used a regression methodology to estimate the statistical relationship between companies' regulated revenue and their subscribership.[81] The data for

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[76] *Order, Commission Requirements for Cost Support Material To be Filed With 1990 Annual Access Tariffs*, DA 90-274, 5 FCC Rcd 1364, 1364 (Common Carrier Bur. 1990).

[77] 47 C.F.R. § 64.1401(a); *see Report and Order and Notice of Proposed Rulemaking*, CC Docket Nos. 91-141 & 92-222, 7 FCC Rcd 7369, 7398 (1992).

[78] *See* 47 C.F.R. §§ 43.21, 43.22, 43.41, 43.43.

[79] 47 C.F.R. § 32(a).

[80] *Notice of Proposed Rulemaking*, CC Docket No. 86-467, ¶ 48 (rel. Dec. 12, 1986).

[81] Regression analysis is a statistical technique used to estimate the value of a random variable (the dependent variable), given that the value of an associated variable (the independent variable) is known. The regression equation is the algebraic formula by which the estimated value of dependent variable (in this case, the number of subscribers associated with annual regulated revenue) is determined. Generally, the functional relationship between the independent variable and the dependent variable is expressed as:

$$y = f(x) + e \qquad (1)$$

this methodology were taken from the Warren Publishing Inc. cable services database mentioned above. According to this methodology, $100 million in annual regulated revenue is equivalent to 413,830 subscribers. We have rounded the exact figure to 400,000 subscribers for the administrative convenience of operators, franchising authorities, and the Commission. SCBA also equates $100 million in annual revenues with approximately 400,000 subscribers, based on its data showing average per subscriber revenues of about $20 per month. In defining a small cable company, we conclude that it would be better to continue to rely on the total number of subscribers, rather than to rely on a revenue figure. A definition based on subscribers is simpler to apply and will avoid the need to allocate revenues between regulated and unregulated services. Furthermore, evidence suggests that operating challenges faced by small cable companies are closely tied to the number of subscribers served rather than the revenues they generate. In addition, a subscriber-based standard should provide cable companies with the maximum flexibility to add new services and new programming, thereby increasing revenues without losing the benefits of rate relief.

32. At the same time, however, the Commission recognizes that a company's

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where 'y,' the value of the dependent variable (number of subscribers), is determined by 'x,' the independent variable (annual revenue at MSO level). Random variable 'e' is added to the algebraic formula to account for variables other than 'x' that may influence the dependent variable. In the above functional relationship, since 'e' is random, 'y' is also random. It is possible to have different types of functional relationships between dependent and independent variables, e.g., linear or non-linear relationship. We assume that the dependent variable is linearly related to independent variable. Hence we can rewrite f(x) in equation (1) as:

$$f(x) = a + bx \qquad (2)$$

Based on the value of f(x) established in equation (1), equation (2) can be rewritten as:

$$y = a + bx + e \qquad (3)$$

Equation (3) represents a linear regression equation. In this equation, both 'a' and 'b' are "unknown coefficients" and are estimated by fitting a straight line using the 'least-squares criterion'. By the least-squares criterion the best-fitting regression line is that for which the sum of the squared deviation between the actual and estimated values of the dependent variables for the sample is minimum.

Our estimation of the relationship between subscribers and regulated revenues yielded:

$$y = 120.597 + (.004137097)^* x$$

where y = company subscribership and x = company regulated revenues.

revenues will affect its ability to comply with significant regulatory responsibilities. As noted, in the common carrier field we have repeatedly used the standard of $100 million in annual revenues to allocate regulatory burdens. We believe that the impact of regulation on common carriers is similar to that imposed on cable companies. Small cable companies also must generate a minimum level of revenue in order to attract financing to upgrade their networks, to provide new programming to subscribers, and to introduce new services that are now being developed. Therefore, by targeting rate relief at small cable companies with 400,000 or fewer subscribers, we believe we will be assisting those companies earning $100 million or less in annual gross revenues to obtain financing needed to grow.

33. We expect that 66% of all cable systems will meet the expanded definitions of a small system owned by a small cable company. These systems serve only about 12.1% of the nation's subscribers. Consequently, regulatory relief provided to these eligible systems will affect a majority of systems in the industry but a relatively small number of subscribers, thus limiting the overall impact of any rate changes that these new definitions permit.[82]

34. We have chosen to eliminate the existing definitions of a small operator and a small MSO because data made available to the Commission since adoption of the *Second Order on Reconsideration* leads us to conclude that these categories were not broad enough to include all those operators and systems in need of rate and administrative relief. For example, SCBA asserts that only 16 companies meet the definition of a small MSO.[83] Moreover, the small cable industry and local franchising authorities generally state that they find the small operator and small MSO definitions confusing and difficult to understand and to implement. Therefore, the system, operator, and MSO size standards that currently define small operators and small MSOs will no longer be relevant, except for resolving certain pending disputes as discussed more particularly below.

35. In urging the expansion of the class of systems eligible for small system relief, several commenters recommend that we revise the method by which system size is calculated. A small system is currently defined based on the number of subscribers served from its principal headend.[84] A number of commenters argue that the Commission should amend the definition of a small system so that it is defined based upon the number of

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[82] Nonetheless, we believe that the new definitions will not result in unreasonable rates for subscribers. Indeed, the new definitions constitute a needed refinement to the existing definitions and thereby create a better fit between the relief we have created for smaller entities and the class of systems that qualify for that relief.

[83] SCBA Comments at 3.

[84] 47 C.F.R. § 76.901(c).

subscribers served in a franchise area.[85] Under this approach, a cable company that served two franchise areas would be treated for rate regulation purposes as if it operated two separate systems, even if both franchise areas were in fact served by one set of integrated transmission paths running from a single headend. The arguments in favor of this change have been raised before in this proceeding and were rejected by the Commission as unpersuasive.[86] We continue to believe that determining small system size based on a system's principal headend, best harmonizes our small system rate rules with most of our existing regulations on cable system size. For example, the existing exemptions for systems with 1,000 or fewer subscribers in the network non-duplication, public inspection, and technical regulations are based on a system's headend rather than franchise area.[87] To use a franchise area definition would result in some segments of a single integrated cable operation being subject to a different regulatory structure than other segments of the same operation. Therefore, we again reject commenters' suggestions and in expanding current definitions to include systems with 15,000 or fewer subscribers we shall base eligibility on the number of subscribers served from a system's principal headend.

36. We recognize that establishing a numerical test can exclude some systems which may also be in need of rate relief. Therefore, we will entertain petitions for special relief from systems who fail to meet the new definitions but are able to demonstrate that they share relevant characteristics with qualifying systems and therefore should be entitled to the same regulatory treatment. Absent such an avenue, the regulatory treatment of two smaller, nearly identical systems could vary significantly merely because, for example, one is just under, and the other just over, 15,000 subscribers, or because the size of their respective owners varies by a few hundred subscribers. In considering such petitions, relevant factors will include the degree by which the system fails to satisfy either or both definitions, whether the system recently has been the subject of an acquisition or other transaction that substantially reduced its size or that of its operator, and evidence of increased costs (e.g., lack of programming or equipment discounts) faced by the operator. If the system fails to qualify for the small system definition because it is affiliated with a cable company that serves over 400,000 subscribers, we will consider the degree to which that affiliation exceeds our affiliation standards,[88] and whether other attributes of the system warrant that it be

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[85] SCBA Comments at 27-29; NCTA Comments at 13-16.

[86] *See Second Reconsideration Order*, 9 FCC Rcd at 4231.

[87] *See* 47 C.F.R. §§ 76.95, 76.305, and 76.601.

[88] A small system will be considered affiliated with a cable company serving more than 400,000 subscribers if such a company holds more than a 20 percent equity interest (active or passive) in the system or exercises de jure control (such as though a general partnership or majority voting shareholder interest). Where a larger company is so affiliated with the small system, we believe the system will have access to the resources it needs to grow as well as larger systems, and hence should not be in need of the relief we will accord to small systems

treated as a small system notwithstanding the percentage ownership of the affiliate. Likewise, a qualifying system that seeks to obtain programming from a neighboring system by way of a fiber optic link, but that is concerned that interconnection of the two systems will jeopardize its status as a stand-alone small system, may file a petition for special relief to ask the Commission to find that it is eligible for small system relief. This is not an exhaustive list of the factors we will consider in reviewing petitions for special relief; operators may support their petitions with whatever information and arguments they deem relevant.

B. Application of Existing Rate and Administrative Relief

37. We have summarized above the steps we have taken previously to ease burdens on smaller systems and operators.[89] We now address the eligibility of systems that have 15,000 or fewer subscribers and are owned by small cable companies to take advantage of these measures. We also initiate the gradual termination of transition relief for all but low-price systems.

38. To qualify for any existing form of relief, systems and companies must meet the new size standards as of either the effective date of this order or on the date thereafter when they file whatever documentation is necessary to elect the relief they seek, at their election. In completing and filing that documentation, the system may use the most recent subscriber data available to it. A system that is eligible for small system relief on either of the dates described above shall remain eligible for so long as the system has 15,000 or fewer subscribers, regardless of a change in the status of the company that owns the system. Thus, a qualifying system will remain eligible for relief even if the company owning the system subsequently exceeds the 400,000 subscriber cap. Likewise, a system that qualifies shall remain eligible for relief even if it is subsequently acquired by a company that serves a total of more than 400,000 subscribers. The ability to remain eligible for small system relief even after being acquired by a larger operator should increase the value of the system in the eyes of operators and, more importantly, lenders and investors. The enhanced value of the system thus will strengthen its viability and actually increase its ability to remain independent if it so chooses.

39. In most instances, eligibility for small system relief will terminate after the system exceeds 15,000 subscribers. As discussed in the subsections that follow, the manner in which relief will be terminated when the system reaches this subscriber threshold will vary depending upon the type of relief at issue.

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that have no such access. *See Second Reconsideration Order*, 9 FCC Rcd at 4173, n. 157.

[89] *See supra* at para. 4-12.

1. Transition Relief for Small Operators

40. In the *Second Order on Reconsideration*, we stated that transition relief would be available pending the adoption of final rate rules. We adopt final rate rules in the accompanying *Eleventh Order on Reconsideration*. Therefore, we provide herein for the termination of transition relief.[90] Systems currently operating under transition relief may continue to do so until two years from the effective date of this order. We establish this period to allow transition systems adequate time to plan for the conversion to some other form of regulation, rather than requiring an immediate conversion. Such a sudden shift would be disruptive not only to operators, but also to subscribers and franchising authorities who are now accustomed to their operators' regulatory status. Until the termination of transition relief, transition systems shall continue to adjust their transition rates in accordance with existing rules. However, systems need not wait the full two years to convert from transition relief. Thus, for example, a transition system may convert at any time by filing the documentation necessary to establish rates in accordance with our benchmark or cost-of-service rules.

41. Unless the operator terminates its transition status sooner as described above, such relief shall terminate two years from the effective date of this item. By that date, a current transition system must have restructured its rates and satisfied all notice and filing requirements pursuant to either our benchmark or cost-of-service rules, the latter of which include the small system cost-of-service regulations adopted in the accompanying *Eleventh Order on Reconsideration*.[91]

42. Transition relief shall remain available only to small systems that already are operating pursuant to that form of relief. In particular, satisfaction of the new system and company size definitions shall not qualify a system for transition relief. Moreover, no small system that first becomes subject to regulation hereafter shall be entitled to transition relief, including systems that satisfy our existing definition of a small operator. Nothing herein shall affect the applicability of transition relief to low-price systems.

2. Cost-of-Service

43. Systems of 15,000 or fewer subscribers owned by small cable companies may now use FCC Form 1225 to justify higher rates through a cost-of-service showing. This

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[90] This termination of transition relief shall affect only systems who qualify for that relief on the basis of size. Low-price systems shall remain eligible for transition relief as provided under the existing rules.

[91] These requirements will not apply if the transition system is subject to an alternative rate agreement in accordance with the *Eighth Order on Reconsideration* as of the date transition relief ends.

"short form" reduces the number of reporting categories and involves fewer calculations. Qualifying systems that have not previously established rates in accordance with Form 1225 may do so on a prospective basis only. Upon exceeding 15,000 subscribers, any system that has established rates based on Form 1225 may continue to charge its then permitted rate and may adjust rates in accordance with all rules applicable to systems that have more than 15,000 subscribers. We believe it unduly burdensome and disruptive to require operators to engage in the standard benchmark or cost-of-service showing immediately upon passing the 15,000 subscriber threshold. This is particularly true in the case of cost-of-service systems since their permitted rates reflect their cost of debt, amortization schedules, and other items that will be established before the system reaches that threshold and will remain constant thereafter. Depriving Form 1225 filers of adjustments for inflation, external cost increases, and channel additions would be inconsistent with the form of relief elected by the operator. Of course, to make a cost-of-service showing after exceeding the 15,000 subscriber threshold, a system will have to use Form 1220.

3. 90-Day "Grace Period"

44. Systems serving 15,000 or fewer subscribers owned by small cable companies currently may avail themselves of the 90-day "grace period" after regulation begins in which to complete and file rate justifications, notify subscribers, and implement restructured rates.[92] Thus, eligible systems are not required to establish rates and service offerings that comply with our rules for 90 days after the initial date of regulation, and they may take up to 60 days from the date of initial regulation to file necessary rate justification forms with their local franchising authority, or the Commission where appropriate. Qualifying systems must continue to give 30 days notice to subscribers prior to implementing rate and service changes.[93] Additionally, eligible systems may make their initial basic tier rates, established in accordance with the Commission's revised rate regulations, effective on 30 days' notice without prior approval from their local franchising authority. If, upon subsequent examination of a rate justification, a local franchising authority or the Commission finds that the system has implemented rates in excess of the maximum permitted rate, refunds may be ordered in accordance with our regulations.[94] If a system exceeds the 15,000-subscriber threshold during a grace period that already is running, or if the first day of regulation is no more than 90 days after the system exceeds 15,000 subscribers, the system shall still be entitled to the full 90-day and 60-day periods described above, beginning with the initial date of regulation.

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[92] *Fifth Order on Reconsideration*, 9 FCC Rcd at 5329, to be codified 47 C.F.R. § 76.934(e).

[93] 47 C.F.R. § 76.932.

[94] 47 C.F.R. §§ 76.942, 76.961

4. Streamlined Rate Reductions

45. We will expand the category of systems eligible for streamlined rate reductions to include those serving 15,000 or fewer subscribers owned by a small cable company. Thus, eligible systems may choose to reduce each billed item of regulated cable service as of March 31, 1994 by 14% [95] as adjusted for subsequent changes in inflation, external costs, and channel additions and deletions. This will enable more systems to reduce administrative burdens because eligible systems choosing streamlined rate reductions are not required to complete FCC Forms 1200 and 1205, unbundle equipment and installation charges from programming service charges, or set equipment and installation charges at actual cost. Qualifying systems may establish rates in accordance with this relief upon satisfaction of all notice and filing requirements. After reaching 15,000 subscribers, these systems will be able to make all rate adjustments permitted of any system with more than 15,000 subscribers, including increases for inflation and external costs. Systems that have elected streamlined rate relief have set their initial permitted rates to reflect the full reduction rate, as adjusted for inflation. Therefore, these systems should be permitted to adjust rates hereafter to reflect subsequent increases in inflation and external costs even after exceeding 15,000 subscribers.

5. Going Forward Rules

46. Systems of any size that are owned by small cable companies and that incur additional monthly per subscriber headend costs of one full cent or more for the addition of a channel may recover the flat mark-up fee for the new channel, plus the actual cost of the headend equipment necessary to add new channels, not to exceed $5,000 per channel, plus the channel's licensing fee, if any, for adding not more than seven new channels to CPS tiers over the next three years, if the monthly per subscriber cost of the additional headend equipment necessary to receive an additional channel is one cent or more.[96] The cost of the headend equipment must be amortized over the useful life of the equipment and small systems will be allowed an 11.25% return on the undepreciated investment.[97] Qualifying systems may elect this relief only with respect to channels added after the effective date of

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[95] 47 C.F.R. § 76.922(b)(5)(ii).

[96] 47 C.F.R. § 76.922(e)(7). We note that many of these systems already may have qualified for this small system going-forward relief even though they have in excess of 1,000 subscribers pursuant to the *Seventh Order on Reconsideration* which makes the relief available to a system with more than 1,000 subscribers if the system is independent or owned by a MSO meeting the prior definition of a small MSO and if the monthly per subscriber cost of the additional headend equipment necessary to receive an additional channel is one cent or more. *Seventh Order on Reconsideration,* MM Docket No. 92-266, FCC 95-8 (rel. Jan. 5, 1995).

[97] *Id.*

this order. Of course, these systems also may offer New Product Tiers which they are permitted to price as they elect, subject to certain conditions.[98] We note that under the existing rule, small systems owned by small MSOs, as those terms were originally defined, could take advantage of this headend upgrade incentive, even if they could not show that the additional monthly per subscriber headend cost of adding a channel was at least one cent. Under the new rule, a system must meet the "one cent rule" in order to qualify for this form of relief. In theory, our revision of the rule could take away this form of relief from systems of under 1,000 subscribers who cannot satisfy the one cent rule. In practice, however, this should not be the case, because the additional cost of headend equipment, when spread over no more than 1,000 subscribers and depreciated reasonably, will always produce a per subscriber monthly cost of at least one cent. If we are incorrect in this conclusion, however, we will entertain petitions for special relief from systems that currently qualify for this form of relief but who would not qualify under the new rule.

6. Alternative Rate Regulation Agreements

47. Systems of 15,000 or fewer subscribers owned by small cable companies will be given the opportunity to work with certified local franchising authorities to create alternative rate regulation agreements in accordance with the *Eighth Order on Reconsideration*.[99] In expanding eligibility, we believe the benefits of alternative rate regulation agreements, i.e., reasonable rates and reduced regulatory burdens, will flow to a greater number of subscribers, cable systems, and local franchising authorities. An agreement made while the system has 15,000 or fewer subscribers shall be enforceable for the term provided in the agreement. Thus, the agreement shall not be terminable simply because the system subsequently exceeds 15,000 subscribers, unless the agreement itself provides for termination at that time.

7. Other Existing Relief

48. Subject to approval of the franchising authority, any system meeting the new small system definition shall be permitted to certify that its rates are reasonable, regardless of the size of the operator.[100] In addition, an operator of any size that owns more than one system with 15,000 or fewer subscribers may establish its unbundled charges for regulated equipment based on the average equipment costs of all such small systems, or only some of them, rather than on a system-by-system basis.[101]

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[98] *See Sixth Reconsideration Order*; to be codified at 47 C.F.R. § 76.987.

[99] *Eighth Order on Reconsideration*, MM Docket Nos. 92-266 & 93-215, FCC 95-42 (February 6,1995).

[100] 47 C.F.R. § 76.934(a).

[101] 47 C.F.R. § 76.923(l).

C. The Small Business Act

49. The Commission does not believe that SBA size standards, to which federal agencies may be required to adhere under Section 3 of the Small Business Act, are applicable to the Commission's definitions of small systems and small cable companies under the 1992 Cable Act. Section 3(a) of the Small Business Act provides that SBA size standards apply for the purposes of all legislation, unless the legislation specifically authorizes different size standards. The 1992 Cable Act in fact suggests one system size definition that the Commission may use as one with 1,000 or fewer subscribers.[102] The Commission has implemented the statutory provision regarding small system relief in a more flexible manner than is explicitly mandated by the Cable Act and is now extending relief to additional systems. But this does not alter the fact that the Commission is implementing a statute with an explicit small business size standard. Therefore, Section 3(a) of the Small Business Act is inapplicable. Section 3(a) is also inapplicable because the SBA defines a small-business concern as one "which is not dominant in its field of operation."[103] Cable systems subject to rate regulation are by definition dominant in their field of operation because they do not face effective competition.

50. Moreover, even if the SBA rules defining a small cable system as one with $11 million or less in gross annual revenues were applicable, the definitions we are adopting today are designed to provide relief to such companies. This *Order* extends relief to cable companies with 400,000 or fewer subscribers, a standard we equate with $100 million in annual regulated revenues as advocated by SBA's Office of Advocacy. Thus, we believe that our standards are more protective of small businesses than is the $11 million dollar standard promulgated by the SBA. In any event, we are directing the Commission's Secretary to provide a copy of this order to the SBA.

VI. ELEVENTH ORDER ON RECONSIDERATION

51. Having redefined the class of systems entitled to relief on the basis of system size, we here adopt expanded relief for such systems. Again, the system may establish its initial eligibility with respect to the system and company size limitations as of the effective date of this order or as of the date the system files the documentation necessary to seek the relief.

52. In adopting transition relief, we stated that when cost studies were completed, we might make permanent, eliminate, or modify such relief for qualifying systems and

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[102] *See* 47 U.S.C. § 543(i).

[103] 15 U.S.C. § 632(a)(1).

operators.[104] We also stated that when we develop average equipment cost schedules, we could terminate or modify our provisions for streamlined rate reductions.[105] Finally, we gave notice that in our final cost proceeding, we may modify our requirements for cost showings by small systems.[106]

53. The comments received in response to the *Further Notice of Proposed Rulemaking* suggest that many smaller cable operators and companies have an immediate need for further relief from certain aspects of rate regulation currently applicable to them. Moreover, we believe that the data we already have accumulated is sufficient to design additional relief for those systems most in need. In such circumstances, we see no reason to impose on smaller systems the burdens and delay that a formal cost study would entail. Therefore, based on the comments received in this proceeding, and in light of other pending petitions for reconsideration, we reconsider on our own motion the *Second Reconsideration Order* as it relates to rate regulation of smaller systems, and hereby make certain relief available to systems that have 15,000 or fewer subscribers and that are owned by a small cable company, as we have now defined that term.[107]

54. As explained more fully below, eligible systems will be able to establish their permitted rates on the basis of an extremely simple formula that requires the operator to supply only five items of data: total operating expenses, net rate base, rate of return, channel count and subscribers. These five items will be used in an easy formula that will generate a per-channel rate that will be presumed reasonable if it is no more than $1.24 per channel. To disapprove such a rate, the franchising authority will have the burden of showing that the cable operator did not reasonably interpret and allocate its cost and expense data in coming up with the operating expense, net rate base, and rate of return figures claimed by the operator in calculating its permitted rate. If the formula-generated rate exceeds $1.24, the burden will be on the operator to establish the reasonableness of its calculations, if the franchising authority elects to question the requested rate. This new optional mechanism will replace most other forms, used to compute rates, including FCC Form 1205. Equipment rates will be set to comply with 47 U.S.C. § 623(b)(3). This new mechanism can be used by any qualifying company, regardless of what rate regulation methodology has been used to

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[104] *Second Reconsideration Order*, 9 FCC Rcd at 4119, 4167-69, 4199-4200.

[105] *Second Reconsideration Order*, 9 FCC Rcd at 4223.

[106] *Id.*; *Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd at 4247.

[107] In light of pending petitions for reconsideration of the *Second Reconsideration Order*, the Commission retains jurisdiction to grant reconsideration on its own motion. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.108; *Central Florida Enterprises v. FCC*, 598 F. 2d 37, 48, n. 51 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979); *Rebecca Radio of Marco*, 5 FCC Rcd 2913, 2914, n. 8 (1990); *see also Order*, MM Docket No. 92-266, FCC 93-372, n. 1, summarized at 41 Fed. Reg. 41042 (August 2, 1993).

justify existing rates or an increase in rates.

55. We adopt these measures partly in response to comments received pursuant to the *Further Notice of Proposed Rulemaking* which we have summarized in the preceding *Sixth Report and Order*. We will not repeat that summary here, except to note again that the comments indicate that smaller cable companies are unduly burdened by the current scheme of rate regulation in two ways. First, the comments suggest that our rate rules do not adequately take into account the higher costs of doing business, and particularly the higher costs of capital, faced by smaller companies. Second, many operators claim that our rules place an inordinate hardship upon them in terms of the labor and other resources that must be devoted to ensuring compliance. Such comments suggest that some operators may be facing the dilemma of desiring to impose rates that our cost-of-service rules may well permit, but at the same time being averse to risking the resources that a cost-of-service showing entails since they cannot be guaranteed that the showing will be successful. In crafting the relief we adopt today, we have attempted to alleviate both the substantive and the procedural burdens of which smaller cable companies complain.

56. We are particularly sensitive to the notion that smaller systems face disproportionately higher costs. In adopting rate rules, the Commission is required to consider operator-specific cost data.[108] Thus, any scheme we adopt must take into account the cost data of the individual operator and give the operator the opportunity to recover its actual, reasonable costs. To some extent, however, the inclusion of operator-specific data in our scheme of rate regulation conflicts with the goal of simplifying the regulatory process. Establishing permitted rates on the basis of precise and detailed data entails more work for the operator that must compile that information from its own records and reproduce it in accordance with whatever forms and formulas we devise. For example, we have estimated that it takes 60 hours to complete the simplified cost-of-service form, FCC Form 1225, which requires operators to provide substantial data regarding the costs incurred in operating the system. Such regulation also imposes a burden on regulatory authorities that must review the data. We note that in many cases small local franchising authorities have scarce resources to review complicated cost-of-service filings. Yet to the extent we lessen the regulatory burden on operators and franchising authorities by reducing the amount of data that must be assembled and reviewed to calculate permitted rates, we are also concerned that we have confidence that the operator's rates are reasonable.

57. Having reviewed the criteria identified by Congress as being relevant to the

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[108] Communications Act, § 623(b)(2)(C)(ii),(iii),(v) and (vi), 47 U.S.C. § 543 (b)(2)(C)(ii),(iii),(v) and (vi) (basic service); Communications Act, § 623(c)(2)(E), 47 U.S.C. § 543(c)(2)(E) (cable programming services).

establishment of rate regulations,[109] we have created a formula for generating permitted rates that entails as small a burden as possible while still producing a rate that reflects with reasonable accuracy the operating costs and capital investments of the operator. The formula can be expressed as follows:

$$\text{Per channel per subscriber rate*} = \frac{\text{Annual operating expenses*} + (\text{Net rate base*} \times \text{rate of return})}{\text{Number of regulated channels} \times \text{Number of subscribers}}$$

*For regulated services only

This formula is designed to establish the annual per-channel per-subscriber revenue requirements of the regulated system. The formula permits a regulated cable company to set a per-channel per-subscriber rate that will both cover operating expenses and provide a reasonable return on investments. Such a recovery is necessary to guarantee the operator the opportunity to attract new capital, promote innovation, and cover all essential costs of operating a cable system. The new method can be used to justify existing rates, or establish new rates, regardless of what rate regulation has been used in the past. Operators may rely on previously existing information, such as tax forms or company financial statements, rather than recreating financial calculations.

58. To ensure that the per-channel revenue requirement is reasonable, all operating costs must be covered. Therefore, wages, salaries, programming, advertising, electricity, maintenance, depreciation, amortization and all other relevant costs are included in the total operating expenses. This is not an exhaustive list, however, and operators may recover other reasonable and legitimate costs of providing service. As under our standard benchmark and cost-of-service regulations, when calculating operating expenses the operator must take into account only those expenses related to providing regulated channels. Congress specifically provided that regulation of rates for the basic service tier ("BST") should take into account general operating costs only to the extent those costs are allocable to basic service.[110] With respect to regulation of both BST and CPST rates, inclusion of costs related to unregulated services would distort the revenue requirement for the regulated channels and equipment, since there are no restrictions on the discretion of cable operators in establishing rates for unregulated services. More specifically, inclusion of costs related to the provision of unregulated services could result in those services being subsidized by revenues from regulated channels. Clearly, Congress did not intend such a result.[111] However, to further

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[109] Communications Act, § 623(b)(2)(C), 47 U.S.C. § 543 (b)(2)(C) (basic service); Communications Act, § 623(c)(2), 47 U.S.C. § 543(c)(2) (cable programming services).

[110] Communications Act, § 623(b)(2)(B)(ii) and (iii), 47 U.S.C. § 543(b)(2)(B)(ii) and (iii).

[111] *Id.*

our goal of minimizing regulatory burdens, we are granting small cable systems owned by small cable companies substantial flexibility to fairly allocate costs between BST, CPST, equipment and unregulated services. We further stress that, when the requested rate does not exceed $1.24 per channel, the burden will be on the franchising authority to show that the operator was unreasonable in making allocations such as these.

59. The net rate base is included in the formula to reflect net investment. The net rate base consists of the depreciated value of property. It provides the proper basis for calculating a fair rate of return on investment. For the reasons stated in the preceding paragraph, only assets associated with providing regulated services may be included in the calculation of the net rate base. However, the operator shall have substantial flexibility in calculating its net rate base. The presumptions and restrictions applicable to standard cost-of-service proceedings shall not apply. Thus, for example, we will not presume it unreasonable to include in the rate base start-up losses that exceed the first two years of operating expenses.[112] Having isolated a category of systems for whom our standard rules need to be relaxed due to the particular characteristics of those systems, we seek to ensure that those systems will be permitted to establish rates in accordance with such characteristics, rather than in accordance with characteristics of cable systems generally.

60. Likewise, we will not presumptively exclude intangibles such as acquisition costs from the net rate base. In the *Cost Order*, we presumptively excluded acquisition costs for reasons that, again, were more applicable to cable systems as a whole than to the subset of systems at issue in this proceeding. For example, whereas we found that acquisition costs were attributable in part to the growing number of programs and channels available only by subscribing to cable service,[113] the limited channel line-ups of smaller systems means that a greater portion of their offerings consist of broadcast channels that many consumers can view for free without subscribing to cable. Thus, the acquisition costs of a smaller system are less likely to include a supra-competitive valuation of services over which the system has exclusive control. Likewise, in the *Cost Order* we concluded that excess acquisition costs reflected, in part, the value of unregulated services, such as premium and pay-per-view programming, that should not be included in regulated rates.[114] Smaller systems with more limited channel line-ups are less likely to have such programming available. As we noted above, the average premium revenue per subscriber is more than $32.00 less for systems with fewer than 15,000 subscribers than for systems with more than 15,000 subscribers.[115] Thus, acquisition costs for small systems will reflect more accurately the value of the regulated services, a value which the operator should be able to recover.

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[112] *See Cost Order*, 9 FCC Rcd at 4563-64.

[113] *Id.*, 9 FCC Rcd at 4578-79.

[114] *Id.*, 9 FCC Rcd at 4579.

[115] *See supra* at ¶ 27.

61. At a minimum, the permitted rate of return shall equal the operator's actual cost of debt as set forth in any loan agreements with third parties. However, the operator may make reasonable adjustments to this rate to reflect other relevant factors such as, but not limited to, its cost of equity and its capital structure. The operator will have substantial discretion in determining the precise manner in which its rate of return is calculated. Thus, the operator will not be limited to the single methodology for establishing cost of equity that we identified in the *Cost Order*.[116] We selected that methodology because it included a large group of publicly traded companies that we found to be representative of the universe of nonregulated firms.[117] While such a sampling is an appropriate source of surrogates for regulated cable service generally, we believe that small systems owned by small cable companies should be able to pursue any methodology that is appropriate based on their individual characteristics. Likewise, operators will not be limited to the range of debt-to-equity ratios applicable in a standard cost-of-service showing,[118] but instead may establish a system-specific or assumed ratio.[119]

62. Finally, eligible systems shall not face the heavy burden imposed on operators seeking rates of return higher than 11.25% in standard cost-of-service proceedings.[120] On the basis of the comments in this proceeding, we now recognize that, of all cable companies, smaller systems and operators are the ones for whom this rate is most likely to be inadequate to compensate them for the risks they encounter in providing service. Therefore, for operators seeking to establish rates no higher than $1.24 per channel, the rate of return claimed by the operator will be subject to the same strong presumption of reasonableness that will apply to all other aspects of the operator's calculation of its permitted rate.

63. Because it takes into account all operating expenses and the net rate base, the formula will generate a rate that covers the cost of providing all regulated services and all equipment necessary to receive those services. Thus, eligible systems will not be required to make a separate showing with respect to equipment. Operators may establish equipment rates in the manner they choose, so long as this results in equipment rates that comply with the 1992 Cable Act.[121]

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[116] *Cost Order*, 9 FCC Rcd at 4626.

[117] *Id.*

[118] *Cost Order*, 9 FCC Rcd at 4632.

[119] Those systems that currently have a negative equity percentage could not achieve a reasonable rate of return using its actual debt/equity ratio. Therefore, these companies may use a reasonable assumed ratio.

[120] *Cost Order*, 9 FCC Rcd at 4616 & n. 327.

[121] Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3).

64. To implement this scheme of rate regulation, we have created FCC Form 1230, a one-page form on which the system inserts its expense, rate base, rate of return, channel count and subscriber count figures and then calculates its permitted rate. The system can set rates at any level up to the rate generated by FCC Form 1230. Before increasing rates, the system must comply with the 30-day notice requirement applicable whenever a system takes a rate increase.[122] In giving notice to the certified local franchising authority of its first rate increase taken pursuant to this procedure, the operator shall include the completed FCC Form 1230 showing the maximum permitted rate, although the system need not raise rates to the maximum permitted level. As noted above, when filing the form the system shall not be required to file documentation or calculations underlying the expense and rate base figures included on the form. Upon filing of the form, however, our existing rules, permitting a certified local franchising authority to review the proposed rates, to request additional information, and to toll the effective date of the proposed rates, will then apply,[123] subject to certain conditions set forth below. Because Form 1230 is a modified cost-of-service showing, the franchising authority may toll the rate for up to 150 days.[124]

65. In view of our intent to minimize burdens upon operators, local franchising authorities, and the Commission, we urge franchising authorities to carefully limit their requests for information, should they deem it necessary to request further information upon the filing of Form 1230. We recognize that certified franchise authorities have a responsibility to protect consumers from the exercise of market power by cable operators and may have a legitimate need to request information to verify operators' rate requests. We believe that, particularly since operators have been given wide discretion in choosing methods of calculating operating costs, rate base, and rate of return, franchise authorities should have access to the information necessary for judging the validity of methods used for calculating these costs. With respect to requested rates not exceeding $1.24 per channel, a reasonable request for information, if deemed necessary at all, should seek only existing, relevant documents or other data compilations and should not require the operator to create documents, although the operator should replicate responsive documents that are missing or destroyed. Where the requested rate exceeds $1.24 per channel, a broader request for supporting documentation, and greater scrutiny of that documentation, will be permitted.

66. In order to guard against burdensome and unnecessary data requests from franchising authorities, cable operators will be permitted to seek relief from the Commission. If a request for information by the franchising authority exceeds a reasonable scope as

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[122] 47 C.F.R. § 76.932.

[123] 47 C.F.R. § 76.933.

[124] 47 C.F.R. § 76.933(b)(2).

described above, or if the franchising authority tolls a rate request,[125] the operator may file an interlocutory appeal requesting the Commission to quash the request. The appeal of a request for information or a rate suspension may be by an informal letter to the chief of the Cable Services Bureau rather than by way of a formal pleading. The appeal will be handled pursuant to the following expedited procedure. The franchising authority is required to respond to an interlocutory appeal in seven days; the cable operator's optional reply date is four days thereafter. The operator will not be required to respond to a franchising authority's request for information while an appeal is pending at the Commission. The Commission will resolve those appeals expeditiously.

67. The operator may appeal a request for information or a tolling order even if its requested rate exceeds $1.24 per channel. However, where the requested rate is no more than $1.24 per channel, our review of the appeal will be guided by the presumption of reasonableness that will attach to rates not exceeding that amount and by our conception of what constitutes a reasonable request for information, as described above. A decision by the Commission to sustain an operator's interlocutory appeal will be accompanied by an order directing the franchising authority to issue the appropriate order based upon the documentation previously supplied by the operator.[126]

68. We have adopted the rate of $1.24 per channel for the purposes set forth above based on the 35 FCC Form 1220 cost-of-service filings that have been submitted by systems with 15,000 or fewer subscribers owned by what we have defined here as small cable companies. We expect to adjust this figure in the future to account for changes in the relevant economic data, such as inflation. Using the rate-setting formula that we hereby adopt, staff found that the subscriber-weighted average cost per channel for eligible systems that had filed FCC Form 1220 amounted to $.93. Because this is an average figure, we know that, according to the data provided on the forms, a fair number of these Form 1220 filers would be entitled to rates exceeding $.93 per channel, presumably because of higher costs or recent capital improvements that justified a higher than average rate. Using the $.93 figure for purposes of establishing presumptions of reasonableness would have imposed an unfair burden on many systems for whom a higher rate is well justified. Therefore, one standard deviation was added to the $.93 per channel rate, producing a per channel rate of

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[125] As noted above, small systems owned by small cable companies may make their initial basic tier rates, established in accordance with the Commission's rate regulations, effective on 30 days' notice without prior approval from their local franchising authority, subject to refund liability if the rates are found later to be unreasonable. *See supra* ¶ 44. Therefore, with respect to small systems owned by small cable companies, the tolling provision of our rules applies when a system seeks to increase rates above a level previously established pursuant to one of our regulatory schemes, but does not apply when a system establishes rates after first becoming subject to regulation.

[126] When appropriate, we will make informal attempts at mediation of such disputes.

$1.24.[127] We therefore believe that a strong presumption of reasonableness should attach to a rate at or below this level when established by an eligible operator. As noted above, to disapprove a rate that does not exceed $1.24 per channel, the burden will be upon the franchising authority to show that the cable operator did not reasonably interpret and allocate its cost and expense data in coming up with the operating expense, net rate base, and rate of return figures claimed by the operator in calculating its permitted rate.

69. Once the operator has established rates at a level permitted by Form 1230, it may increase rates thereafter at its discretion until it reaches the maximum level permitted by the form, subject only to the 30 days' notice requirement. Even though the operator is charging less than the maximum rate permitted by Form 1230, the operator may adjust that maximum rate. For example, an operator may adjust its maximum permitted rate to take account of inflation and increases in external costs.[128] Likewise, when adding channels an operator may use the going-forward methodology[129] to adjust its maximum permitted rate. While making these adjustments to the maximum permitted rate, the operator simultaneously may, but need not, increase the actual rate charged. Thus, adjustments to the actual rate charged may be made independent of adjustments to the maximum rate permitted. As long as the actual rate does not exceed the maximum permitted rate, the operator may adjust its actual rate as and when it desires, subject to the notice requirement. In addition, at any time an operator may adjust its maximum permitted rate simply by filing a new Form 1230.

70. Once the operator has established rates at the maximum level permitted by Form 1230, the operator will be able to increase its actual rate by adjusting its maximum permitted rate in accordance with our normal rules to reflect increases in inflation and external costs. When adding channels, an operator may establish its new rate by filing a new Form 1230 or by complying with the going forward rules.[130] In determining the number of

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[127] Standard deviation is a commonly used measure of variability. It measures the amount of variance from the average in a sample. The amount of variance is usually expressed in terms of one or more standard deviations from the average. One standard deviation, when applied to the average, generally will capture about two-thirds of the sample, e.g., in this case, two-thirds of eligible cable systems. Two standard deviations generally will capture about 95% of the sample. In this case we selected one standard deviation as the appropriate measure. Thus, about one-third of eligible systems who file for this form of relief should have rates above the $1.24 threshold and will have the burden of justifying their rates.

[128] 47 C.F.R. § 76.922(d)(3).

[129] 47 C.F.R. § 76.922(e).

[130] The operator must elect between the two forms of relief. Therefore, upon adding a channel, an operator may file a new Form 1230 reflecting that channel addition, *or* elect going-forward treatment with respect to the new channel, but it cannot do both.

channels for which a small system owned by a small cable company may claim the alternative going-forward treatment that we adopted in the *Sixth Reconsideration Order*, only those channels added after the system files its first Form 1230 shall be counted. Therefore, if an operator added channels under the alternative going-forward rules before filing its initial Form 1230, the previously added channels will not be counted against the maximum of seven channels that an operator may add for purposes of those rules. However, the filing of a second or subsequent Form 1230 shall not increase the number of channel additions qualifying for the alternative going-forward treatment.

71. The cable system and any other participant in the rate making proceeding at the franchising authority level may appeal to the Commission for review of the final decision of the franchising authority under our normal appellate procedure.[131] If the rate decision is appealed by the operator, we first will review any challenged request for information that was not the subject of an interlocutory appeal by the operator. If, under the standards outlined above, we find no proper grounds for the request for information, we will have the ability to permit the operator to charge the requested rate without proceeding further. Thus, where the requested rate does not exceed $1.24, if a franchising authority denies the request on the basis of information that goes beyond the reasonable scope described above, we will reverse the rate decision. If the scope of information requested by the franchising authority is not at issue up on appeal of the final rate decision, the franchising authority will have the burden of proving the reasonableness of its decision to deny any requested rate that does not exceed $1.24, and the operator will have the burden of establishing the reasonableness of the requested rate if it exceeds that amount. Thus, we will look more closely at rates exceeding $1.24 per channel and, as noted above, will be less restrictive with respect to the permissible scope of information which the franchising authority may request and rely upon in determining the reasonableness of the rate. If we uphold a franchising authority decision to request further information, we will permit an operator to present its arguments as to why its rate is reasonable.

72. Complaints regarding CPST rates will be resolved by the Commission, as required by the 1992 Cable Act.[132] In reviewing CPST rates pursuant to a complaint, we will apply the same standard that is to be applied by a certified franchising authority when an operator files its Form 1230.

73. A system's initial and continued eligibility for this new form of relief shall be determined in the same manner as any other relief now available to them.[133] Thus, if a system qualifies for relief under this approach as of the effective date of this order or as of the date it files Form 1230, it shall remain eligible for so long as it serves 15,000 or fewer

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[131] 47 C.F.R. § 76.944.

[132] Communications Act, § 623(c)(1)(B), 47 U.S.C. § 543(c)(1)(B).

[133] *See supra* ¶ 38.

subscribers, regardless of whether it, or the cable operator that owns the system, is subsequently acquired by a company that exceeds the 400,000 subscriber limit, or if its current operator subsequently exceeds 400,000 subscribers due to the normal growth of its systems.[134] When a system that has established rates in accordance with Form 1230 exceeds 15,000 subscribers, the system may maintain its then existing rates. However, any further adjustments shall not reflect increases in external costs, inflation or channel additions until the system has re-established initial permitted rates in accordance with our benchmark or cost-of-service rules.[135]

74. Finally, we must address the applicability of this new form of relief to pending matters. We have little reason to question those commenters who contend that our existing rules have significantly burdened small systems. Accordingly, we will direct franchising authorities to permit systems to use the small system cost-of-service approach to justify rates in any proceeding that is pending as of the date this item is released, using data that was accurate as of the time the rates were charged. To apply the small cable system cost-of-service relief to a pending case, the system must show that it met the new definitions of a small system owned by a small cable company as of the date this item is released and as of the period during which the disputed rates were in effect. Our adoption of this new form of relief shall not affect the validity of a final rate decision made by a franchising authority before the release date of this item. If such a decision is appealed to the Commission, we will review the decision in accordance with the rules that were in effect at the time the rates were charged and the decision was made. We believe that the interests of administrative finality warrant this treatment of cases already decided by a final decision of the franchising authority.

75. In any proceeding before the Commission involving a CPST complaint in which a final decision had not been issued as of the release date of this item, a small system owned by a small cable company may elect the form of rate regulation set forth in this section to justify rates charged prior to the adoption of this rule and to establish new rates. This approach will apply regardless of the current phase of the proceedings. Thus, a small system owned by a small cable company may file its Form 1230 to oppose a CPST rate complaint, to support a timely petition for reconsideration of a previous Bureau or Commission decision regarding a CPST complaint, or to support a petition for Commission review of a Bureau decision regarding a CPST complaint. As with cases pending before franchising authorities, to apply the small cable system cost-of-service relief to a case currently pending before the Commission, the system must show that it met the new definitions of a small system owned by a small cable company as of the date this item is released and as of the period during which the disputed rates were in effect.

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[134] *Id.*

[135] Such a system may file a petition for special relief seeking continued treatment as a small system. *See supra* ¶ 36.

VII. REGULATORY FLEXIBILITY ANALYSIS

76. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-12, the Commission's final analysis with respect to the *Sixth Report and Order and Eleventh Order on Reconsideration* is as follows:

77. Need and purpose of this action: The Commission, in compliance with section 3(i) of the Cable Television Consumer Protection and Competition Act of 1992 pertaining to rate regulation, adopts rules and procedures intended to ensure cable subscribers of reasonable rates for cable services with minimum regulatory and administrative burden on cable entities.

78. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis: There were no comments submitted in response to the Initial Regulatory Flexibility Analysis contained in the *Further Notice of Proposed Rulemaking*. The Chief Counsel for Advocacy of the United States Small Business Administration filed comments in the original rulemaking order. The Commission addressed these comments in the *Rate Order*.[136] The Chief Counsel for Advocacy of the United States Small Business Administration also filed comments in response to the *Further Notice of Proposed Rulemaking*. Those comments are addressed herein.

79. Significant alternatives considered and rejected. Petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. The Commission responded to these comments in this order which will significantly reduce the burdens on small cable systems and small cable companies.

VIII. Paperwork Reduction Act

80. The requirements adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

IX. Ordering Clauses

81. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303 (r), 612, and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 532, and 543 the rules, requirements and policies discussed in this *Sixth Report and Order and Eleventh Order on Reconsideration* ARE ADOPTED and Section 76.934 of the

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[136] *See Rate Order*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993).

Commission's rules, 47 C.F.R. Section 76.934, IS AMENDED as set forth in Appendix B.

82. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Order to the Chief Counsel for Advocacy of the United States Small Business Administration.

83. IT IS FURTHER ORDERED that, the requirements and regulations established in this decision shall become effective upon approval by the Office of Management and Budget of the new information collection requirements adopted herein, but no sooner than thirty (30) days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

LIST OF COMMENTERS

Comments

Antietam Cable, et al.
Community Antenna Television Association
National Cable Television Association
Small Cable Business Association
U.S. Small Business Administration

Reply Comments

Antietam Cable, et al.
Avenue TV Cable, et al.
Community Antenna Television Association
National Cable Television Association
National Telephone Cooperative Association

APPENDIX B

RULE CHANGES

Part 76 of Title 47 of the Code of Federal Regulations is amended to read as follows:

Part 76 Cable Television Service

1. Section 76.901 is amended by revising paragraph (c) and paragraph (e) to read as follows:

§ 76.901 Definitions.

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(c) Small System. A small system is a cable television system that serves 15,000 or fewer subscribers. The service area of a small system shall be determined by the number of subscribers that are served by the system's principal headend, including any other headends or microwave receive sites that are technically integrated to the principal headend.

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(e) Small cable company. A small cable company is a cable television operator that serves a total of 400,000 or fewer subscribers over one or more cable systems.

2. Section 76.922 is amended by revising paragraphs (b)(4)(A), (b)(4)(B), (b)(5)(A), (b)(5)(B), (b)(5)(C) and (e)(7) to read as follows.

§ 76.922 Rates for the basic service tier and cable programming services tiers.

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(b) ***

(4) ***

(A) Termination of transition relief for systems other than low price systems. Systems other than low-price systems that already have established a transition rate as of the effective date of this rule may maintain their current rates, as adjusted under the price cap requirements of Section 76.922(d), until two years from the effective date of this rule. These systems must begin charging reasonable rates in accordance with applicable rules, other than transition relief, no later than that date.

(B) Low-price systems. Low price systems shall be eligible to establish a transition rate

for a tier, pending a further order of the Commission.

(1) A low-price system is a system

(a) Whose March 31, 1994 rate is below its March 31, 1994 benchmark rate, or

(b) whose March 31, 1994 rate is above its March 31, 1994 benchmark rate, but whose March 31, 1994 full reduction rate is below its March 31, 1994 benchmark rate, as defined in Section 76.922(b)(2), above.

(2) The transition rate on May 15, 1994 for a system whose March 31, 1994 rate is below its March 31, 1994 benchmark rate is the system's March 31, 1994 rate. The March 31, 1994 rate is in both cases adjusted:

(a) To establish permitted rates for equipment as required by Section 76.923 if such rates have not already been established; and

(b) For changes in external costs incurred between the earlier of initial date of regulation of any tier or February 28, 1994, and March 31, 1994, to the extent changes in such costs are not already reflected in the system's March 31, 1994 rate. The transition rate on May 15, 1994 for a system whose March 31, 1994 adjusted rate is above its March 31, 1994 benchmark rate, but whose March 31, 1994 full reduction rate is below its March 31, 1994 benchmark rate, is the March 31, 1994 benchmark rate, adjusted to establish permitted rates for equipment as required by Section 76.923 if such rates have not already been established.

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(5) ***

(A) Small systems that are owned by small cable companies and that have not already restructured their rates to comply with the Commission's rules may establish rates for regulated program services and equipment by making a streamlined rate reduction. Small systems owned by small cable companies shall not be eligible for streamlined rate reductions if they are owned or controlled by, or are under common control or affiliated with, a cable operator that exceeds these subscriber limits. For purposes of this rule, a small system will be considered "affiliated with" such an operator if the operator has a 20 percent or greater equity interest in the small system.

(B) The streamlined rate for a tier on May 15, 1994 shall be the system's March 31, 1994 rate for the tier, reduced by 14 percent. A small system that elects to establish its rate for a tier by implementing this streamlined rate reduction must also reduce, at the same time, each billed item of regulated cable service, including equipment, by 14 percent. Regulated rates established using the streamlined rate reduction process shall remain in effect until:

(1) Adoption of a further order by the Commission establishing a schedule of average equipment costs;

(2) The system increases its rates using the calculations and time periods set forth in FCC Form 1211; or

(3) The system elects to establish permitted rates under another available option set forth in paragraph (b)(1) of this Section.

(C) Implementation and notification. An eligible small system that elects to use the streamlined rate reduction process must implement the required rate reductions and provide written notice of such reductions to subscribers, the local franchising authority and the

Commission according to the following schedule:

(1) Within 60 days from the date it receives the initial notice of regulation from the franchising authority or the Commission, the small system must provide written notice to subscribers and the franchising authority, or to the Commission if the Commission is regulating the basic tier, that it is electing to set its regulated rates by the streamlined rate reduction process. The system must then implement the streamlined rate reductions within 30 days after the written notification has been provided to subscribers and the local franchise authority or Commission.

(2) If a cable programming services complaint is filed against the system, the system must provide the required written notice, described in (C)(1) above, to subscribers, the local franchising authority or the Commission within 60 days after the complaint is filed. The system must then implement the streamlined rate reductions within 30 days after the written notification has been provided.

(3) A small system is required to give written notice of, and to implement, the rates that are produced by the streamlined rate reduction process only once. If a system has already provided notice of, and implemented, the streamlined rate reductions when a given tier becomes subject to regulation, it must report to the relevant regulator (either the franchising authority or the Commission) in writing within 30 days of becoming subject to regulation that it has already provided the required notice and implemented the required rate reductions.

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(e) ***

(7) Headend upgrades. When adding channels to CPSTs and single-tier systems, cable systems that are owned by a small cable company and incur additional monthly per subscriber headend costs of one full cent or more for an additional channel may choose among the methodologies set forth in paragraphs (e)(2) and (e)(3) of this Section. In addition, such systems may increase rates to recover the actual cost of the headend equipment required to add up to seven such channels to CPSTs and single-tier systems, not to exceed $5,000 per additional channel. Rate increases pursuant to this paragraph may occur between January 1, 1995, and December 31, 1997, as a result of additional channels offered on those tiers after May 14, 1994. Headend costs shall be depreciated over the useful life of the equipment. The rate of return on this investment shall not exceed 11.25 percent. In order to recover costs for headend equipment pursuant to this paragraph, systems must certify to the Commission their eligibility to use this paragraph, and the level of costs they have actually incurred for adding the headend equipment and the depreciation schedule for the equipment.

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3. Section 76.924 is amended by revising paragraph (d) to read as follows:

§ 76.924 Cost accounting and cost allocation requirements.

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(d) **Summary accounts.**

(1) Cable operators filing for cost-of-service regulation, other than small systems owned by small cable companies, shall report all investments, expenses, and revenue and income adjustments accounted for at the franchise, system, regional and/or company level(s) to the summary accounts listed below.

RATEBASE

Net Working Capital
Headend
Trunk and Distribution Facilities
Drops
Customer Premises Equipment
Construction/Maintenance Facilities and Equipment
Programming Production Facilities and Equipment
Business Offices Facilities and Equipment
Other Tangible Assets
Accumulated Depreciation
Plant Under Construction
Organizational and Franchise Costs
Subscriber Lists
Capitalized Start-up Losses
Goodwill
Other Intangibles
Accumulated Amortization
Deferred Taxes

OPERATING EXPENSES

Cable Plant Employee Payroll
Cable Plant Power Expense
Pole Rental, Duct, Other Rental for Cable Plant
Cable Plant Depreciation Expense
Cable Plant Expenses - Other
Plant Support Employee Payroll Expense
Plant Support Depreciation Expense
Plant Support Expense - Other
Programming Activities Employee Payroll
Programming Acquisition Expense
Programming Activities Depreciation Expense
Programming Expense - Other
Customer Services Expense

Advertising Activities Expense
Management Fees
General and Administrative Expenses
Selling General and Administrative Depreciation Expenses
Selling General and Administrative Expenses - Other
Amortization Expense - Franchise and Organizational Costs
Amortization Expense - Customer Lists
Amortization Expense - Capitalized Start-up Loss
Amortization Expense - Goodwill
Amortization Expense - Other Intangibles
Operating Taxes
Other Expenses (Excluding Franchise Fees)
Franchise Fees
Interest on Funded Debt
Interest on Capital Leases
Other Interest Expenses

REVENUE AND INCOME ADJUSTMENTS

Advertising Revenues
Other Cable Revenue Offsets
Gains and Losses on Sale of Assets
Extraordinary Items
Other Adjustments

(2) Except as provided in Section 76.934(h), small systems owned by small cable companies that file for cost-of-service regulation shall report all investments, expenses, and revenue and income adjustments accounted for at the franchise, system, regional and/or company level(s) to the following summary accounts:

RATEBASE

Net Working Capital
Headend, Trunk and Distribution System and Support Facilities and Equipment
Drops
Customer Premises Equipment
Production and Office Facilities, Furniture and Equipment
Other Tangible Assets
Accumulated Depreciation
Plant Under Construction
Goodwill
Other Intangibles
Accumulated Amortization
Deferred Taxes

OPERATING EXPENSES

Cable Plant Maintenance, Support and Operations Expense
Programming Production and Acquisition Expense
Customer Services Expense
Advertising Activities Expense
Management Fees
Selling, General and Administrative Expenses
Depreciation Expense
Amortization Expense - Goodwill
Amortization Expense - Other Intangibles
Other Operating Expense (Excluding Franchise Fees)
Franchise Fees
Interest Expense

REVENUE AND INCOME ADJUSTMENTS

Advertising Revenues
Other Cable Revenue Offsets
Gains and Losses on Sale of Assets
Extraordinary Items
Other Adjustments

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4. Section 76.934 is revised to read as follows:

§ 76.934 Small systems and small cable companies.

(a) For purposes of rules governing the reasonableness of rates charged by small systems, the size of a system or company shall be determined by reference to its size as of the date the system files with its franchising authority or the Commission the documentation necessary to qualify for the relief sought or, at the option of the company, by reference to system or company size as of the effective date of this paragraph. Where relief is dependent upon the size of both the system and the company, the operator must measure the size of both the system and the company as of the same date. A small system shall be considered affiliated with a cable company if the company holds a 20 percent or greater equity interest in the system or exercises de jure control over the system.

(b) A franchising authority that has been certified, pursuant to § 76.910, to regulate rates for basic service and associated equipment may permit a small system as defined in § 76.901 to certify that the small system's rates for basic service and associated equipment comply with § 76.922, the Commission's substantive rate regulations.

(c) Initial regulation of small systems

(1) If certified by the Commission, a local franchising authority may provide an initial

notice of regulation to a small system, as defined by Section 76.901(c), on May 15, 1994. Any initial notice of regulation issued by a certified local franchising authority prior to May 15, 1994 shall be considered as having been issued on May 15, 1994.

(2) The Commission will accept complaints concerning the rates for cable programming service tiers provided by small systems on or after May 15, 1994. Any complaints filed with the Commission about the rates for a cable programming service tier provided by a small system prior to May 15, 1994 shall be considered as having been filed on May 15, 1994.

(3) A small system that receives an initial notice of regulation from its local franchising authority, or a complaint filed with the Commission for its cable programming service tier, must respond within the time periods prescribed in Sections 76.930 and 76.956.

(d) Statutory period for filing initial complaint. A complaint concerning a rate for cable programming service or associated equipment provided by a small system that was in effect on May 15, 1994 must be filed within 180 days from May 15, 1994.

(e) Petitions for extension of time. Small systems may obtain an extension of time to establish compliance with rate regulations provided they can demonstrate that timely compliance would result in severe economic hardship. Requests for extension of time should be addressed to the local franchising authority concerning basic service and equipment rates and to the Commission concerning rates for a cable programming service tier and associated equipment. The filing of a request for an extension of time to comply with the rate regulations will not toll the effective date of rate regulation for small systems or alter refund liability for rates that exceed permitted levels after May 15, 1994.

(f) Small Systems owned by Small Cable Companies. Small systems owned by small cable companies shall have 90 days from their initial date of regulation on a tier to bring their rates for that tier into compliance with the requirements of Sections 76.922 and 76.923. Such systems shall have sixty days from the initial date of regulation to file FCC Forms 1200, 1205, 1210, 1211, 1215, 1220, 1225, and 1230 and any similar forms as appropriate. Rates established during the 90-day period shall not be subject to prior approval by franchising authorities or the Commission, but shall be subject to refund pursuant to sections 76.942 and 76.961 of these rules.

(g) Alternative rate regulation agreements.

(1) Local franchising authorities, certified pursuant to § 76.910, and small systems owned by small cable companies may enter into alternative rate regulation agreements affecting the basic service tier and the cable programming service tier. (i) Small systems must file with the Commission a copy of the operative alternative rate regulation agreement within 30 days after its effective date.

(2) Alternative rate regulation agreements affecting the basic service tier shall take into account the following:

(i) The rates for cable systems that are subject to effective competition;

(ii) The direct costs of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant

to §§ 76.56 and 76.64 of this subpart, and changes in such costs;
(iii) Only such portion of the joint and common costs of obtaining, transmitting, and otherwise providing such signals as is determined to be reasonably and properly allocable to the basic service tier, and changes in such costs;
(iv) The revenues received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;
(v) The reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;
(vi) Any amount required to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and
(vii) A reasonable profit. The rate agreed to in such an alternative rate regulation agreement shall be deemed to be a reasonable rate.

(3) Alternative rate regulation agreements affecting the cable programming service tier shall take into account, among other factors, the following:
(i) The rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;
(ii) The rates for cable systems, if any, that are subject to effective competition;
(iii) The history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;
(iv) The rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis;
(v) Capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and
(vi) The revenues received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned. The rate agreed to in such an alternative rate regulation agreement shall be deemed to be a reasonable rate.

(4) Certified local franchising authorities shall provide a reasonable opportunity for consideration of the views of interested parties prior to finally entering into an alternative rate regulation agreement.
(5) A basic service rate decision by a certified local franchising authority made pursuant to an alternative rate regulation agreement may be appealed by an interested party to the Commission pursuant to §76.944 as if the decision were made according to §§ 76.922 and 76.923.

(h) Small system cost-of-service showings.
(1) At any time, a small system owned by a small cable company may establish new rates, or justify existing rates, for regulated program services in accordance with the small cable company cost-of-service methodology described below.
(2) The maximum annual per subscriber rate permitted initially by the small cable company cost-of-service methodology shall be calculated by adding
(i) The system's annual operating expenses to
(ii) The product of its net rate base and its rate of return, and then dividing that sum by (iii) the product of
(A) The total number of channels carried on the system's basic and cable programming service tiers and
(B) The number of subscribers. The annual rate so calculated must then be divided by 12 to arrive at a monthly rate.
(3) The system shall calculate its maximum permitted rate as described in paragraph (b) of this section by completing Form 1230. The system shall file Form 1230 as follows:
(i) Where the franchising authority has been certified by the Commission to regulate the system's basic service tier rates, the system shall file Form 1230 with the franchising authority.
(ii) Where the Commission is regulating the system's basic service tier rates, the system shall file Form 1230 with the Commission.
(iii) Where a complaint about the system's cable programming service rates is filed with the Commission, the system shall file Form 1230 with the Commission.
(4) In completing Form 1230:
(i) The annual operating expenses reported by the system shall equal the system's operating expenses allocable to its basic and cable programming service tiers for the most recent 12 month period for which the system has the relevant data readily available, adjusted for known and measurable changes occurring between the end of the 12 month period and the effective date of the rate. Expenses shall include all regular expenses normally incurred by a cable operator in the provision of regulated cable service, but shall not include any lobbying expense, charitable contributions, penalties and fines paid on account of statutes or rules, or membership fees in social service, recreational or athletic clubs or associations.
(ii) The net rate base of a system is the value of all of the system's assets, less depreciation.
(iii) The rate of return claimed by the system shall reflect the operator's actual cost of debt, its cost of equity, or an assumed cost of equity, and its capital structure, or an assumed capital structure.
(iv) The number of subscribers reported by the system shall be calculated according to the most recent reliable data maintained by the system.
(v) The number of channels reported by the system shall be the number of channels it has on its basic and cable programming service tiers on the day it files Form 1230.
(vi) In establishing its operating expenses, net rate base, and reasonable rate of return, a system may rely on previously existing information such as tax forms or company financial statements, rather than create or recreate financial calculations. To the extent existing information is incomplete or otherwise insufficient to make exact calculations, the system

may establish its operating expenses, net rate base, and reasonable rate of return on the basis of reasonable, good faith estimates.

(5) After the system files Form 1230, review by the franchising authority, or the Commission when appropriate, shall be governed by Section 76.933, subject to the following conditions.

(i) If the maximum rate established on Form 1230 does not exceed $1.24 per channel, the rate shall be rebuttably presumed reasonable. To disallow such a rate, the franchising authority shall bear the burden of showing that the operator did not reasonably interpret and allocate its cost and expense data in deriving its annual operating expenses, its net rate base, and a reasonable rate of return.

(ii) In the course of reviewing Form 1230, a franchising authority shall be permitted to obtain from the cable operator the information necessary for judging the validity of methods used for calculating its operating costs, rate base, and rate of return. If the maximum rate established on Form 1230 does not exceed $1.24 per channel, any request for information by the franchising authority shall be limited to existing relevant documents or other data compilations and should not require the operator to create documents, although the operator should replicate responsive documents that are missing or destroyed.

(iii) A system may file with the Cable Services Bureau an interlocutory appeal from any decision by the franchising authority requesting information from the system or tolling the effective date of a system's proposed rates. The appeal may be made by an informal letter to the Chief of the Cable Services Bureau, served on the franchising authority. The franchising authority must respond within seven days of its receipt of the appeal and shall serve the operator with its response. The operator shall have four days from its receipt of the response in which to file a reply, if desired. If the maximum rate established on Form 1230 does not exceed $1.24 per channel, the burden shall be on the franchising authority to show the reasonableness of its order. If the maximum rate established on Form 1230 exceeds $1.24 per channel, the burden shall be on the operator to show the unreasonableness of the order.

(iv) In reviewing Form 1230 and issuing a decision, the franchising authority shall determine the reasonableness of the maximum rate permitted by the form, not simply the rate which the operator intends to establish.

(v) A final decision of the franchising authority with respect to the requested rate shall be subject to appeal pursuant to section 76.944. The filing of an appeal shall stay the effectiveness of the final decision pending the disposition of the appeal by the Commission. An operator may bifurcate its appeal of a final rate decision by initially limiting the scope of the appeal to the reasonableness of any request for information made by the franchising authority. The operator may defer addressing the substantive rate-setting decision of the franchising authority until after the Commission has ruled on the reasonableness of the request for information. At its option, the operator may forego the bifurcated appeal and address both the request for documentation and the substantive rate-setting decision in a single appeal. When filing an appeal from a final rate-setting decision by the franchising authority, the operator may raise as an issue the scope of the request for information only if that request was not approved by the Commission on a previous interlocutory appeal by the operator.

(6) Complaints concerning the rates charged for a cable programming services tier by a

system that has elected the small cable company cost-of-service methodology may be filed pursuant to Section 76.957. Upon receipt of a complaint, the Commission shall review the system's rates in accordance with the standards set forth above with respect to basic tier rates.

(7) Unless otherwise ordered by the franchising authority or the Commission, the system may establish its per channel rate at any level that does not exceed the maximum rate permitted by Form 1230, provided that the system has given the required written notice to subscribers. If the system establishes its per channel rate at a level that is less than the maximum amount permitted by the form, it may increase rates at any time thereafter to the maximum amount upon providing the required written notice to subscribers.

(8) After determining the maximum rate permitted by Form 1230, the system may adjust that rate in accordance with this paragraph. Electing to adjust rates pursuant to one of the options set forth below shall not prohibit the system from electing a different option when adjusting rates thereafter. The system may adjust its maximum permitted rate without adjusting the actual rate it charges subscribers.

(i) The system may adjust its maximum permitted rate in accordance with the price cap requirements set forth in Section 76.922(d).

(ii) The system may adjust its maximum permitted rate in accordance with the requirements set forth in Section 76.922(e) for changes in the number of channels on regulated tiers. For any system that files Form 1230, no rate adjustments made prior to the effective date of this rule shall be charged against the system's Operator's Cap and License Reserve Fee described in Section 76.922(e)(3).

(iii) The system may adjust its maximum permitted rate by filing a new Form 1230 that permits a higher rate.

(iv) The system may adjust its maximum permitted rate by complying with any of the options set forth in Section 76.922(b)(1) for which it qualifies or under an alternative rate agreement as provided in paragraph (g) of this section.

(9) In any rate proceeding before a franchising authority in which a final decision had not been issued as of June 5, 1995, a small system owned by a small cable company may elect the form of rate regulation set forth in this section to justify the rates that are the subject of the proceeding, if the system and affiliated company were a small system and small company respectively as of the effective date of this rule and as of the period during which the disputed rates were in effect. This rule shall not affect the validity of a final rate decision made by a franchising authority before June 5, 1995.

(10) In any proceeding before the Commission involving a cable programming services tier complaint in which a final decision had not been issued as of June 5, 1995, a small system owned by a small cable company may elect the form of rate regulation set forth in this section to justify rates charged prior to the adoption of this rule and to establish new rates. For purposes of this paragraph, a decision shall not be deemed final until the operator has exhausted or is time-barred from pursuing any avenue of appeal, review, or reconsideration.

5. Section 76.953 is amended by removing paragraph (a) and redesignating paragraph (b) and paragraph (c) as paragraph (a) and paragraph (b) respectively.

June 2, 1995

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

In the matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (MM Docket No. 92-26 and MM Docket No. 93-215).

Today's decision to provide additional rate regulation relief for small systems and to enlarge the scope of relief by increasing the number of systems that satisfy the definition of "small" are steps which I have supported for some time. While we have made efforts to develop solutions to problems endemic to these systems, market reaction and reports of small systems in technical default of financing agreements and bordering on bankruptcy were evidence that our rules were insufficient in addressing these concerns.

Though I support today's action, I must raise two(2) issues which give me reason for pause. First, it has always been my position that small independent systems and systems owned by small multiple system operators needed greater flexibility under our rate regulations to accommodate characteristics that are unique to these entities. In today's decision, we allow a small system to retain the benefits of our modified rules even if that system is acquired by a "large" MSO. While I understand that this allows a small system to attract potential lenders in the financial market, I also believe the advantages of our rules will become misplaced and potentially misused. Indeed, small systems acquired by large MSOs will presumably have management and operations benefits as well as the financial affiliation in the marketplace that would clearly prove advantageous to the system. Moreover, these rules could ultimately result in a large MSO owning small systems that receive disparate treatment under our rules so that only the acquired small system will be permitted to establish its rates under the newer regulatory framework. I, therefore, question the justification for continuing the additional rate regulation relief.

Second, I am concerned about our application of the modified rate rules to pending rate cases that have not reached final determination. The Commission will be in a position of having some prior decisions made under less favorable regulations and then bestowing a benefit on cases that, for whatever reason, have yet to become final. However, I believe public policy should dictate our actions here. Though the Commission or local franchising authorities could determine under the previous rules that a reduction in the rate is warranted, in the end, the system would be entitled to increase its rate on a prospective basis. The effect on consumers of lowering and then raising rates would undoubtedly be confusion.

In addition, I question whether it makes sense on the one hand for the Commission to recognize the need for meaningful relief for these systems and then on the other to apply rules that fail to satisfy that need.

Though I have these concerns, I believe that the Commission has taken the proper action to address and then to resolve specific issues adversely impacting small systems.

FCC 95-185

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
The NYNEX Telephone Companies	)
Petition for Waiver	)
	)
Transition Plan to Preserve Universal	)
Service in a Competitive Environment	)

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1995 Released: May 4, 1995

By the Commission: Commissioners Barrett, Ness, and Chong issuing separate statements.

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I. INTRODUCTION

1. NYNEX requests a waiver of Parts 61 and 69 of the Commission's rules to permit it to use different methods for assessing certain categories of access charges prescribed by our rules. NYNEX claims that, in light of the development of competition in the provision of telecommunications services in the NYNEX region, the compensation methods prescribed by our rules unfairly disadvantage NYNEX and produce uneconomic results. Specifically, NYNEX claims that certain access charges contain subsidy components that result in rates in excess of the relevant costs, and that such pricing cannot be sustained in a competitive environment. Although NYNEX favors a comprehensive reform of the access charge and jurisdictional separations rules, it claims that the existing rules impose special hardships upon NYNEX because market conditions in its region differ from conditions in other parts of the country. Therefore, it argues that it needs interim relief from the requirements of the current rules while the Commission explores more comprehensive reform.

2. As described below, pursuant to Section 1.3 of our Rules,[1] we grant NYNEX's request in part. We conclude, based on this record, that competitive developments in LATA 132,[2] which comprises the New York City metropolitan area, justifies granting a limited waiver in that area. In so doing, we recognize that, among other factors, regulatory changes by this Commission and the New York Public Service Commission (NYPSC) and steps NYNEX has taken create an environment that is open to competitive entry in exchange and access services in the New York City metropolitan area and that competitive providers are beginning to offer services in competition with NYNEX in the area. Certain aspects of our access charge rules are likely not to operate in the public interest in the New York City metropolitan area in light of these circumstances. Within the New York City metropolitan area, we grant NYNEX a limited waiver regarding two access charge elements. Based on the current record, we decline to waive our rules with respect to LATA 132 to the further extent originally sought by NYNEX, or to grant any waiver for the remainder of NYNEX's service area, because we are unable to conclude that granting such relief would serve the public interest.

II. BACKGROUND

3. NYNEX provides local exchange telephone services in New York and New England. NYNEX and other local exchange carriers (LECs) also originate and terminate long-distance services provided by interexchange carriers (IXCs). The origination or termination of long-distance or interexchange services is commonly known as access service. NYNEX provides access for IXCs in New York and New England. The provision of interstate access service by LECs is regulated by this Commission.

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[1] 47 C.F.R. § 1.3.

[2] Local Access and Transport Area (LATA) 132 is defined and described in more detail below. See infra ¶ 25 & n.48.

4. This Commission promulgated rules in the early 1980s to establish a system of tariffed charges for interstate access services provided by LECs. Most of those tariffed access charges are billed to IXCs. The access charge rules, which are found in Part 69 of this Commission's Rules, 47 C.F.R. Part 69, govern the rate structure and pricing of interstate access.

5. Charges for the origination or termination of interexchange services that use switching in the local or end office switch are known as switched access charges. Other access charges are described as special access charges. For the switched access services, the Part 69 rules prescribe the elements that must be used in the access tariffs, as well as the method for assessing charges for each switched access element. The NYNEX waiver request would affect three of the major switched access components: (1) the common line element; (2) the local switching element; and (3) the transport interconnection charge.

6. The Part 69 access charge rules use the term "common line" to describe the connection between the premises of a subscriber to local exchange telephone service and the local or end office switch of the LEC that is used in common for local exchange service and some interstate and intrastate interexchange services. That connection can also be described as a "subscriber line" or "local loop." Interstate common line costs are recovered through a combination of flat monthly per-line charges billed to end users and per-minute charges billed to IXCs. The per-line charge, often known as the subscriber line charge (SLC), is described as an end user common line charge in the Part 69 rules. The per-minute charge to the IXCs, which is based on "access minutes" or interstate minutes of use,[3] is described as the carrier common line charge (CCL).

7. The Part 69 access charge rules impose a cap of $3.50 per line upon the monthly subscriber line charge to residential customers and business customers who subscribe to one local exchange service line.[4] Business customers that subscribe to two or more lines, sometimes referred to as multi-line business customers, are subject to a subscriber line charge that cannot exceed $6 per line.[5]

8. The Part 69 access charge rules originally required pooling of common line costs and revenues by all LECs, under which LECs contributed revenues to a "pooled" fund or withdrew revenues from that fund, in order to reach nationally averaged common line charges. That mandatory pooling arrangement was subsequently replaced by a system permitting exchange carriers to leave the pool and set their common line rates based on their own common line costs. Under this new system, however, the Commission required NYNEX, and other LECs leaving the common line pool, to collect amounts in their carrier common line charges to be contributed

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[3] 47 C.F.R. § 69.2(a).

[4] See 47 C.F.R. § 203(a).

[5] See 47 C.F.R. § 104(d).

through the National Exchange Carrier Association to enable higher cost LECs to maintain common line rates that would be comparable to a pooled rate.[6] Those contributions are described as long-term support payments. Thus, NYNEX's carrier common line rate recovers both a portion of its own interstate common line costs and its long-term support obligations.

9. The second access element at issue here is the local switching element. Part 69 access charge rules establish a local switching element in the access service tariffs that recovers costs of local or end office switching that are allocated to interstate services pursuant to the jurisdictional separations rules.[7] The rules require LECs to levy local switching charges on IXCs on a per-minute basis.

10. The final access charge that is the subject of NYNEX's petition is the transport interconnection charge. The transport charges in access service tariffs recover interstate costs of transmission and tandem switching between end office switches and IXC points of presence. Historically, transport charges were recovered on a per-minute basis, even though many transport facilities are dedicated to the use of individual IXCs. In 1992, the Commission decided to restructure transport rates to make them more economically rational, including flat rates per trunk to recover the non-traffic sensitive cost of certain dedicated transport facilities, and to price most transport services based on the pre-existing rates for comparable special access services.[8] The restructured transport rate elements created in this manner recovered much less revenue than the historic per-minute transport charges. Thus, the Commission created the transport interconnection charge, initially priced on a residual basis, so that, when initially implemented, the transport rate restructure per se would not change the amount of revenues recovered by the LECs for transport services, i.e., the restructure was intended to be revenue-neutral to the LECs. The per-minute transport interconnection charge applies to all access minutes of traffic using the LEC switched access network, including traffic passing over LEC transport facilities as well as traffic passing over competitive access providers' transport facilities and interconnected with the LEC switched access network.

11. The price cap rules in Part 61 of the Commission's Rules give LECs that are subject to price caps some flexibility in establishing some of the access charges.[9] The price cap rules do not, however, change the prescribed access elements. The rules do split interstate services, including access elements, into discrete groups called baskets. For each basket of access services, price cap carriers can establish charges that do not exceed an index value for that

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[6] See 47 C.F.R. §§ 69.603(e), 69.612.

[7] See 47 C.F.R. § 69.106.

[8] See Transport Rate Structure and Pricing, Third Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 3030 (1994), for a more detailed explanation of the transport rate restructure.

[9] See 47 C.F.R. §§ 61.41-61.43, 61.45-61.47

basket. Price cap carriers have some flexibility in establishing the amount of charges for elements or services that are included in the same basket, as long as the actual price index for the basket does not exceed the price cap index for that basket. Services in a basket may, however, be split into service categories. Pricing flexibility is limited by banding rules that establish separate upper and lower pricing bands for each service category within a basket.[10] Local switching and the transport interconnection charge are classified as service categories in the traffic sensitive and trunking baskets, respectively.[11] Unlike most other service categories, the transport interconnection charge service category is subject to an upward band of 0 percent relative to the overall price cap index, and has no downward pricing limit.[12]

12. Our access charge rules require that the carrier common line, local switching, and transport interconnection charges, as well as most other access charges, be uniform throughout each of a LEC's study areas. A study area generally comprises all of a LEC's service area within a particular state.[13] The access charge rules originally prohibited any deaveraging of access charges within a study area.[14] The Special Access Expanded Interconnection Order authorized LECs to establish a system of traffic density-related rate zones within a study area, with different special access rates in each zone.[15] The Commission subsequently authorized LECs to use the same zones for purposes of establishing divergent rates in different zones for some transport charges, but not the transport interconnection charge.[16] LEC central offices in areas with the highest traffic densities were assigned to Zone 1; offices in areas with intermediate degrees of density were assigned to Zone 2; and offices in areas with the lowest density were assigned to Zone 3.

III. NYNEX'S PETITION

13. On December 15, 1993, NYNEX filed a petition for waiver of Parts 61 and 69 of the Commission's rules to enable NYNEX to implement a plan that NYNEX refers to as the

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[10] See 47 C.F.R. § 61.47(e), (g), & (h).

[11] See 47 C.F.R. § 61.42(e)(1)(ii); 6.42(e)(2)(vi).

[12] See 47 C.F.R. § 61.47(g)(3).

[13] See Expanded Interconnection with Local Telephone Company Facilities, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7452 n.403 (1992) (Special Access Expanded Interconnection Order).

[14] See 47 C.F.R. § 69.3(e)(6).

[15] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7454-56.

[16] Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7426-29 (1993) (Transport Expanded Interconnection Order).

Universal Service Preservation Plan (or "USPP"). Under the plan, NYNEX would reduce or eliminate certain charges that are assessed to IXCs on a per-minute basis, and would recover most of the revenues yielded by these rate reductions through other charges assessed to IXCs. NYNEX proposes different combinations of charges for the three different zones within the NYNEX region.

14. NYNEX maintains that special circumstances in the NYNEX region justify a waiver of the applicable access charge and price cap rules to permit NYNEX to implement its plan to realign rates for access services. NYNEX contends that various federal or state regulatory requirements have forced NYNEX to price some services above costs and to price other services below costs; that many of the resulting subsidies are reflected in switched access charges that exceed costs; and that this system of subsidies can only work in a monopoly environment.[17] Although NYNEX believes that these problems could be solved through a comprehensive rulemaking proceeding, NYNEX says the Commission should grant a waiver to provide interim relief from some subsidy burdens in the NYNEX region because NYNEX has an "acute need" for such relief and "cannot wait for a long term solution to the subsidy and contribution problems."[18] NYNEX says the existing subsidies create greater and more urgent problems in the NYNEX region because the NYNEX region contains the highest concentration of high-volume, low-cost business markets that are most affected by switched access pricing and because competition from other access providers is more advanced within the NYNEX region. NYNEX notes that the first competitive access network in the country was introduced in New York City in 1985,[19] the two largest competitive access providers derive half of their revenues from the NYNEX region,[20] the NYPSC has required NYNEX to allow competitive access providers to connect loops to NYNEX switches,[21] and that Commission has granted 18 companies certificates to operate as local telephone companies in NYNEX territory.[22]

15. First, NYNEX proposes to recover the portion of carrier common line revenues attributable to long-term support payments to other LECs through a charge assessed to each IXC based on the IXC's share of nationwide interstate revenues.[23] NYNEX describes the proposed charge for long-term support as a "bulk billing" charge. NYNEX uses the term "bulk billing"

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[17] NYNEX Petition at 1-3.

[18] Id. at 3.

[19] NYNEX Petition at 17.

[20] Id.

[21] Id. at 19.

[22] Id. at 20.

[23] NYNEX Petition Ex. 11 at 2-3.

to describe an assessment formula that is not based upon facilities or services actually used in a particular billing period.

16. Second, NYNEX proposes to recover the remainder of the carrier common line revenues (which recover NYNEX's own interstate common line costs) attributable to multi-line business customers through a charge assessed to IXCs based on the number of lines in the NYNEX region presubscribed to each respective IXC.[24] NYNEX originally proposed to adjust these per-presubscribed line charges by a weighting formula to reflect revenues of IXCs.[25] That weighting formula was designed to reduce the burden imposed upon IXCs (such as AT&T) that have a relatively large number of low-volume presubscribed customers. In its reply comments, NYNEX modified its plan to eliminate this weighting formula.[26] NYNEX also proposes an adjustment to attribute presubscribed lines to its own limited interstate toll operations.[27]

17. Third, NYNEX proposes to reduce the per-minute local switching charge for all zones and all users. NYNEX contends that, while the Commission's rules treat local switching costs as traffic sensitive (i.e., the costs vary in proportion to the amount of usage) and require LECs to levy local switching charges on a per-minute basis, a portion of NYNEX local switching costs are actually non-traffic sensitive (i.e., the costs do not vary with usage). NYNEX, relying upon its own cost study to determine the non-traffic sensitive portion of the local switching costs, proposes to recover those non-traffic sensitive costs through a charge per presubscribed line.[28] NYNEX originally proposed that this charge would be weighted in the same manner as the per-presubscribed line charge to recover carrier common line revenue.[29] In its reply, NYNEX submitted a plan, as discussed more fully in paragraph 19, that assessed the per presubscribed line charge on IXCs without applying a weighting factor.

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[24] The AT&T antitrust consent decree required divested Bell Operating Companies to establish a system that permits local exchange service subscribers to access a designated interexchange carrier without using access codes. United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), aff'd, Maryland v. United States, 460 U.S. 1001 (1993). That process is described as presubscription.

[25] NYNEX Petition Ex. 11 at 10-12.

[26] NYNEX Reply App. 10 at 5.

[27] NYNEX Reply App. 10 at 6. The AT&T antitrust consent decree permits NYNEX to provide some services that are classified as interexchange or interLATA for purposes of that decree between some points in New York and New Jersey. Those services are commonly known as corridor services. Commission rules require NYNEX to pay access charges to itself when NYNEX provides interstate interexchange services.

[28] NYNEX Petition Ex. 11 at 3, 8-9.

[29] NYNEX Petition Ex. 11 at 10.

18. Fourth, NYNEX proposes to deaverage the transport interconnection charge and apply different charges to minutes attributable to different categories of end-users and to different geographic zones. NYNEX proposes to reduce the transport interconnection charge for access minutes attributable to Zone 1 business customers with multiple lines by $52 million. That reduction was designed to reduce total per-minute interstate switched access charges for those Zone 1 business users to 2 cents per access minute. NYNEX proposes to absorb about $25 million of reduced transport interconnection charge revenues, and to recover the remaining $27 million of reduced transport interconnection charge revenues through a per-presubscribed line charge.[30]

19. In its reply comments, NYNEX presented an alternative plan for recovering revenues from local switching and the transport interconnection charge that would no longer be recovered through per-minute access charges. NYNEX described an alternative bulk billing approach similar to that used to recover revenue attributable to long-term support payments in its original plan and proposed to apply that approach to local switching and transport interconnection charges as well.[31] NYNEX designated this as a minute of use or "MOU" plan. The alternative plan adopted a different form of bulk billing based upon interstate toll minutes that IXCs originate or terminate in the NYNEX region, rather than basing it on each IXC's nationwide share of interstate revenues, as NYNEX originally had proposed for long-term support recovery. The IXCs would report toll minutes to an independent organization. That organization would compute toll minute market shares annually and report confidential results to NYNEX for billing purposes only.[32] NYNEX would bill the IXCs monthly.[33] Toll minutes attributable to facilities of other access providers and to special access facilities supplied by NYNEX would be included in the assessment formula.

20. Finally, NYNEX proposes to modify the structure of the price cap service categories applicable to the local switching and transport interconnection charges. NYNEX proposes to create two new separate service subcategories within the local switching category for the per-line and per-minute local switching charges that it proposes to create. For the per-line service subcategory, NYNEX proposes an upper pricing band of 0 percent relative to the price cap index and a -5 percent lower pricing band.[34] In addition, NYNEX proposes to create three new service subcategories within the transport interconnection charge service category: the new per-line charge; the per-minute charge for usage attributable to residential and single-line business

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[30] NYNEX Petition Ex. 11 at 3.

[31] NYNEX Reply App. 10 at 2.

[32] NYNEX Reply App. 10 at 6.

[33] NYNEX Reply App. 10 at 2.

[34] NYNEX Petition Ex. 12 at 3.

lines; and the per-minute charge for usage attributable to business customers with multiple lines.[35] NYNEX also proposes to create separate zone subcategories in each zone used for density zone pricing purposes for the single-line and multi-line transport interconnection charge.[36]

IV. OVERVIEW OF THE PARTIES' POSITIONS

21. The pleadings filed in response to the NYNEX waiver petition do not dispute the NYNEX view that existing rules should be revised to reduce or eliminate some subsidy components. Several LECs support the waiver request and advocate granting interim relief to other LECs that request it.[37] Ad Hoc and ALTS contend that it would be unwise to grant any interim waivers because granting interim waivers will undermine efforts to achieve a more comprehensive access reform.[38]

22. A number of parties oppose the NYNEX waiver request, contending that it does not satisfy applicable criteria for waivers of agency rules established in prior court decisions.[39] Some contend that a petition for waiver must demonstrate circumstances that are unique in kind and NYNEX does not claim that its circumstances are unique in kind.[40] According to these parties, other LECs are or will be confronting the same types of problems that NYNEX describes. Others claim that NYNEX has not demonstrated special circumstances in the NYNEX region that are unique in degree or kind because NYNEX has not demonstrated that NYNEX needs interim relief in order to respond to switched access competition.[41] Some comments contend that alternative cost recovery guidelines that this Commission adopted in 1986 are applicable to this waiver request and that the NYNEX request does not satisfy some of those guidelines.[42]

23. An array of IXCs, as well as MFS, object to the specific cost recovery methods proposed by NYNEX, and claim that implementing such cost recovery methods in a particular

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[35] NYNEX Petition Ex. 12 at 4.

[36] Id.

[37] Ameritech Comments at 2; Bell Atlantic Comments at 3; GTE Comments at 6; Southwestern Bell Comments at 2.

[38] Ad Hoc Opposition at 8; ALTS Opposition at 10.

[39] Ad Hoc Opposition at 7; MCI Opposition at 5; Time Warner Comments at 5-7.

[40] E.g., Ad Hoc Opposition at 7.

[41] AT&T Comments at 5-10; CompTel Comments at 3; Locate Comments at 2; MCI Opposition at 5-6; MFS Comments at 6-7; Teleport Comments at 1, 3-9.

[42] See ALTS Opposition at 6-10.

zone or region will produce anomalous results that will distort competition in interexchange markets by changing relative access costs of IXCs in an unfair manner.[43] Some parties contend that the plan is likely to produce adverse effects for some end user customers.[44] ALTS, EMI, and MCI contend that the plan would produce unreasonable discrimination between business customers with multiple lines and other customers and between customers in different zones.[45]

V. DISCUSSION

A. Overview

24. Under Section 1.3 of our rules, we are authorized to grant waivers "if good cause therefor is shown."[46] As interpreted by the courts, this requires that a petitioner demonstrate that "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[47]

25. We conclude that NYNEX has shown that a number of interrelated regulatory and economic developments specifically applicable to the local access and transport area (LATA) that includes New York City and the surrounding metropolitan area, known as "LATA 132,"[48] create special circumstances justifying a limited waiver of the Commission's access charge rules for that area. First, the state regulatory commission and NYNEX have taken a number of steps, not to date taken in other parts of the country, that remove significant barriers to the growth of competition in the access and exchange markets. Second, competitive service providers are active to a greater extent in the New York City metropolitan area than is generally the case in other areas of the country, and are offering alternative sources of supply for many switched local telecommunications services within much of the LATA. In addition, given the removal of significant barriers to entry in New York and the particularly high concentration of high-volume toll users in the New York City area, the potential for additional entry by competitive providers

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[43] AT&T Comments at 15-17; CompTel Comments at 8; RCI Comments at 9-10; EMI Comments at 3, 10; MFS Comments at 18-19.

[44] Ad Hoc Opposition at 2,5; AT&T Comments at 18; ALTS Opposition at 8-9.

[45] ALTS Opposition at 9; EMI Comments at 9; MCI Comments at 9.

[46] 47 C.F.R. §1.3.

[47] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[48] LATA 132 includes New York City; Nassau and Suffolk Counties on Long Island; and Westchester, Rockland, and Putnam Counties north of New York City, as well as small portions of several nearby counties. LATAs are local areas within which Bell operating companies were permitted to provide service under the consent decree that broke up the Bell System. See United States v. AT&T, 569 F. Supp. 990 (D. D.C. 1983).

is especially high in that area. These factors, which are discussed extensively in the special circumstances section below, generally distinguish the economic conditions existing in the New York City metropolitan area from other areas in NYNEX's region and the remainder of the country. In light of these special circumstances, we conclude that the grant of a limited waiver of certain access charge rules, as set forth below, will better serve the public interest than would rigid adherence to the current rules.

26. We adopted the access charge rules in the early 1980s, when the LECs were the only providers of local exchange telephone service in their respective market areas, and exercised monopoly power in the provision of interstate switched access service. The access charge rules contain certain provisions, such as the carrier common line charge and the transport interconnection charge, that the Commission found served public policy goals, but whose structure reflected the monopoly environment of that time. Certain of the rules result in access rates that do not reflect the nature of the costs recovered by the particular rate element, and thus provide inaccurate price signals that skew incentives regarding the production and consumption of telecommunications services. Nonetheless, in a monopoly environment, we concluded that these disadvantages were outweighed by various policy benefits such as minimizing flat charges paid by end users. In the increasingly competitive, highly concentrated telecommunications market in the New York City metropolitan area, the balance among divergent public interest goals may shift, and the Commission may need to address that balance in individual cases as changing conditions emerge in different areas of the country. We conclude that marketplace distortions created in LATA 132 by certain of our rules outweigh the benefits that those rules were intended to foster in the first place. The specified rules create incentives for shifting traffic from NYNEX's switched network to potentially less efficient competitors, and may stimulate unproductive investment. Moreover, given the increasingly competitive environment in LATA 132, the rules do not advance our universal service goals in the manner we originally intended. In these circumstances, we find that a limited waiver of these rules in LATA 132 would better serve the public interest.

27. For example, our access charge rules require LECs to recover a substantial portion of their common line costs from IXCs through per-minute carrier common line charges, even though LECs incur these costs in a non-traffic sensitive manner based on the number of subscriber lines provided, not on the number of minutes. The purpose of the carrier common line charge when it was adopted in the early 1980s was to advance universal service by reducing the need for high flat-rate subscriber line charges to end-users.[49] This cost recovery structure was possible in a monopoly environment, in which IXCs have no alternative to the LEC for originating and terminating interstate calls. In an environment in which multiple providers can compete to offer switched interstate access, however, IXCs (and their end-user customers) can shift to alternative carriers and avoid paying NYNEX rates that recover non-traffic sensitive common line costs, resulting in several consequences that are not in the public interest. Because

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[49] MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, Phase I, 93 FCC 2d 241, 266-67, 278-81 (1983).

of the concentration of high-volume toll users and the reduced barriers to entry in LATA 132, the rule may stimulate entry by providers that may face higher costs to provide service than NYNEX, but can nonetheless offer service at lower rates because of the absence of this burden. The rule may also result in NYNEX raising the carrier common line rates for its remaining customers, which in turn, may increase long-distance rates and exacerbate the problem of stimulating uneconomic entry. Thus, in the increasingly competitive environment of LATA 132, the carrier common line charge, as provided in our rules, does not advance our universal service goals in the manner we expected in 1984.

28. Similarly, our access charge rules provide for a transport interconnection charge, which recovers revenues that had been recovered in the LECs' interstate switched transport rates since the access charges were established, but that would not be recovered in those rates if transport facilities were priced based on cost. The transport interconnection charge was established during our 1992 restructure of the LECs' interstate switched transport rates to serve the public policy goal of facilitating a rate restructure that initially would be revenue-neutral to the LECs. The charge may be stable in an environment in which IXCs have no alternative to LEC-provided local switching and loop services for interstate switched access. The per-minute transport interconnection charge artificially creates incentives encouraging IXCs and their customers to seek alternative sources of supply for interstate switched access, however, and, under the more competitive conditions of the New York City metropolitan area, may stimulate entry by providers with higher costs of providing service than NYNEX that can still offer service at lower rates because of the absence of this non-cost-based charge.

29. We believe that the limited waiver of our access charge rules described below will better serve our public interest goals -- fostering vigorous and economically efficient competition, preventing unreasonable discrimination, and preserving universal service -- than application of those rules. In contrast, strict adherence to our current rules will serve only to hobble NYNEX, encourage entry by potentially inefficient competitors, and threaten NYNEX's ability to recover its common line costs, with no apparent corresponding public interest benefits. In the face of the special competitive circumstances that exist in LATA 132, we believe the public interest would not be served by delaying action on the waiver until completion of a generic proceeding, because during such delay NYNEX would be unable to stanch the loss of common line cost recovery and other revenues attributable to our access pricing rules. Moreover, in light of the special circumstances in LATA 132 described above and the volume of traffic generated in LATA 132, the grant of a limited waiver, as described in Section D below, should help ensure that further investment decisions by NYNEX and competing providers in LATA 132 reflect more efficient pricing. In the increasingly competitive environment found in LATA 132, this limited waiver should facilitate interstate access pricing by NYNEX that more closely reflects its actual costs of service, thus creating more accurate incentives for shaping the investment decisions of competing telecommunications providers. This, in turn, should ensure more efficient allocation of resources.[50] Therefore, we conclude that a limited

[50] This point is explained in greater detail infra, ¶¶ 43-44.

waiver of certain of our access charge rules is justified at this time to permit NYNEX to exercise greater flexibility in reducing its transport interconnection charges and to recover some of its common line costs in a manner different from that prescribed by our rules.

B. Legal Standard for Granting a Waiver

30. Positions of the Parties. Some opponents of the NYNEX petition argue that this Commission cannot lawfully grant the waiver that NYNEX requested, and some argue that it would be inexpedient to use a waiver to solve the problems NYNEX has described.[51] Some contend that this Commission cannot grant a waiver of a rule even if the petitioner demonstrates that a rule imposes a special hardship upon the petitioner if circumstances indicate that the rule imposes the same kind of hardship on others,[52] even though to a lesser degree. Ad Hoc says that the petition should be denied because NYNEX does not claim its problems are unique except in degree.[53] Some oppositions or comments that contend that waiver requests must be based upon a hardship that is unique in kind quote a statement in the first WAIT Radio opinion that the "essence of a waiver is the assumed validity of the general rule"[54] as support for that view.

31. Analysis. We disagree with the contention raised by certain commenters that we can only grant waivers to relieve special hardships that are unique in kind. WAIT Radio did not reach such a holding. The "essence of waiver" statement appears in the context of a discussion of the possibility that the Commission denied the waiver because the petitioner in the WAIT Radio case did not attack the general rule.[55] The observation that a waiver petition does not have to demonstrate that a rule is invalid in most cases is not a holding that a waiver petition must demonstrate circumstances that are unique in kind. Special circumstances that are unique in degree may justify a waiver if the waiver will serve the public interest. None of the intervening Court or Commission decisions cited in the pleadings hold, or even suggest, that a waiver must be based upon special hardship that is unique in kind.[56]

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[51] Ad Hoc Opposition at 2,7; ALTS Opposition at 4-6; Time Warner Comments at 2, 5-7.

[52] Ad Hoc Opposition at 7; MCI Opposition at 5; Time Warner Comments at 5-7.

[53] Ad Hoc Opposition at 7.

[54] WAIT Radio v. FCC, 418 F.2d 1153, 1158 (D.C. Cir. 1969), quoted in MCI Opposition at 5 and Time Warner Comments at 5 n.12.

[55] The Court of Appeals remanded that proceeding to the Commission for further explanation of the decision to deny the waiver request. The Commission subsequently reaffirmed the denial of the waiver and the Court of Appeals affirmed that remand decision. WAIT Radio v. FCC, 459 F.2d 1203 (D.C. Cir.), cert. denied, 409 U.S. 1027 (1972).

[56] MFS and Time Warner cite Northeast Cellular Telephone Co. v. FCC, supra. MFS comments at 5, Time Warner comments at 7. MFS also cites Indiana Broadcasting Co. v. FCC, 437 F.2d 680 (D.C. Cir. 1970). MFS Comments at 5. Those opinions do not say that a waiver must be based upon

32. Time Warner cites a statement in a staff-level decision denying a U S West waiver request that a "waiver request should concede the validity of a rule."[57] Time Warner apparently interprets the staff's statement to mean that a petitioner who requests a waiver of an agency rule must acknowledge that the relevant rule produces good results most of the time. We do not believe that WAIT Radio or any other relevant judicial precedent requires a petitioner to acknowledge or affirm that any of our rules serve the public interest as a condition precedent for seeking special relief.[58] Nor do we perceive any public interest reason for such a requirement. The standard is only that the justification for the waiver must show that application of the presumably valid rule would not be in the public interest in the particular circumstances under review. To the extent that the staff's U S West order could be interpreted to require an explicit affirmation of the validity of the rule, we now reject that interpretation.[59]

C. Special Circumstances

33. Positions of the Parties. NYNEX contends that special circumstances exist justifying a waiver throughout its region because it faces, or soon will face, significant competition in local exchange service and related interstate switched access offerings. NYNEX argues that it will be severely handicapped in responding to that competition because its switched access rates include large subsidy components mandated by existing regulatory requirements. According to NYNEX, LATA 132 produces about 50 percent of NYNEX's recurring and usage-based charges for special access and switched access revenue in New York State, and represents approximately 80 percent of NYNEX's total local business revenue in the state.[60] According to NYNEX, competing service providers have extensive telecommunications facilities in the area.

34. NYNEX supplies the following information about its competitors' networks. Teleport's approximately 325-mile long network in New York includes two switches in New York City; provides service for the equivalent of 377,000 voice-grade circuits; connects Manhattan to Brooklyn, Queens, and Staten Island; extends north to White Plains and east to Garden City and Hauppage; and extends west and south into twelve cities and towns in central and northern New Jersey.[61] MFS's network, with a switch in Jersey City, New Jersey and two

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circumstances that are unique in kind.

[57] U S West Communications, Inc. Petition for Waiver of Part 69 of the Commission's Rules, 7 FCC Rcd 4043, 4044 (Com. Car.Bur. 1992), cited in Time Warner Comments at 5 n.12.

[58] We note that U S West did not demonstrate any hardship that was unique in degree or in kind. The Common Carrier Bureau decision to deny that waiver request was not based solely upon that petitioner's failure to concede the validity of the rule.

[59] We do not address any of the other findings or conclusions in the U S West order.

[60] NYNEX Petition, Exhibit 10 at 1.

[61] NYNEX Petition, Exhibit 10 at 33; NYNEX Reply at 13 & Exhibit 7, Attachment 4.

remote switches in New York City, reaches 283 buildings in Manhattan, is slated for expansion to include Brooklyn, Queens, and Bronx, and covers White Plains and other areas in Westchester and Putnam Counties north of New York City.[62] These competitive access providers have 70,000 telephone numbers assigned to their use: 50,000 to Teleport and 20,000 to MFS.[63] Cablevision Lightpath is deploying a 3000-mile fiber-optic network that could deliver both telephone and advanced video services to subscribers on Long Island and New York City; has a 5ESS switch in Hicksville, Long Island; and already provides service to the State University of New York in Stony Brook, the Brookhaven National Laboratory, and in an alliance with AT&T, to Long Island University's campuses in Brookville, Brentwood, Southhampton, and Brooklyn.[64] Time Warner, which serves 910,000 cable television customers in New York City, is deploying a trial of switched telephone service in Queens.[65] NYNEX submitted copies of advertisements of Teleport, MFS, Cablevision Lightpath, ACC, and MCI Metro that suggest that those companies offer a range of services comparable to those that NYNEX provides.[66]

35. NYNEX contends that competing providers have already garnered a substantial share of the market for some local telecommunications services in LATA 132. NYNEX states that competitors have already collocated 36 cages in 16 wire centers in LATA 132. These wire centers provide access to 1.7 million access lines, of which 1 million are multi-line business lines. NYNEX states that approximately 2300 DS1 circuits are installed in these collocated offices for special access and Flexpath,[67] and approximately 1200 DS1 circuits are installed in these offices for switched transport, with another 500 DS1 switched circuits pending installation.[68] NYNEX states that 83 percent of the business lines in the two metropolitan statistical areas with boundaries roughly the same as those of LATA 132 are located in wire centers in which competing local exchange service providers have deployed facilities, are

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[62] NYNEX Petition, Exhibit 10 at 30; NYNEX Reply at 13; Letter from Susanne Guyer, Executive Director-Federal Regulatory Policy Issues, NYNEX, to William Caton, Acting Secretary, FCC, Feb. 17, 1995, Attachment ("Competition in Zones 2 & 3 of LATA 132") at 2.

[63] NYNEX Petition, Exhibit 10 at 34.

[64] NYNEX Petition, Exhibit 10 at 37-38 & Attachment 14; Letter from Susanne Guyer, Executive Director-Federal Regulatory Policy Issues, NYNEX, to William Caton, Acting Secretary, FCC, Feb. 17, 1995, Attachment ("Competition in Zones 2 & 3 of LATA 132") at 1-2.

[65] NYNEX Petition, Exhibit 10 at 39.

[66] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Apr 14, 1995).

[67] Flexpath is an intrastate high-capacity service used in conjunction with private branch exchange and Centrex services.

[68] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Apr. 14, 1995).

providing service, or have announced plans to do so.[69] A 1992 survey of NYNEX's 200 largest customers in Manhattan found that NYNEX's share of the market for customer premise-to-IXC point of presence DS1 service[70] in Manhattan was approximately 64 percent.[71] A more recent market research study indicates that NYNEX retains approximately 52.5 percent of overall high-capacity business (special access and point-to-point exchange) in New York City.[72] NYNEX also states that at least 8.5 percent of the local business usage in LATA 132 originates on networks of competitive LECs.[73] Moreover, NYNEX has experienced significantly less growth in switched access traffic in LATA 132 than elsewhere in New York State, from which NYNEX infers that much of the growth has been carried by competitors. NYNEX reports that from 1991 to 1992, LATA 132 experienced a 2.95 percent growth rate, while the rest of New York State experienced a 7.46 percent growth rate in switched access minutes of use. According to NYNEX, the growth rate in central offices with expanded interconnection during the same period was only 1.26 percent, while the growth rate in Manhattan central offices without expanded interconnection was 1.94 percent.[74] Finally, NYNEX states that residential local messages in LATA 132 grew at a rate of 6.2 percent annually between 1992 and 1995, while business local messages in LATA 132 increased only 2.9 percent per year over the same period.[75] NYNEX believes that these circumstances indicate that a greater level of competition exists in the market for services to businesses. In a recent ex parte filing, NYNEX proposes a number of criteria to determine whether a particular market area is competitive.[76]

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[69] Id.

[70] DS1 is a high capacity service used by large customers.

[71] The shares of other major carriers was as follows: Teleport: 26%; MFS: 5%; AT&T: 4%; Locate: 1%; others: 1%. NYNEX Petition, Exhibit 10 at 2-3, 24; NYNEX Reply, Exhibit. 2 at 3.

[72] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Apr. 14, 1995).

[73] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Apr. 14, 1995).

[74] NYNEX Petition, Exhibit 10 at 25.

[75] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Apr. 14, 1995).

[76] Letter from Susanne Guyer, Executive Director-Federal Regulatory Policy Issues, NYNEX, to William F. Caton, Acting Secretary, FCC (March 3, 1995). Specifically, NYNEX argues that a market area should be considered competitive when the state commission has authorized competing providers of local exchange service; competing providers have been assigned telephone exchange numbers; the incumbent LEC has made available to competing providers arrangements network interconnection, mutual compensation for termination of traffic, interim number portability, and related matters; and a specified percentage of the access lines in the market area are located in wire centers in which competing local exchange service providers have deployed facilities, are providing service, or have announced plans to

36. Several IXCs and competitive access providers question the sufficiency of NYNEX's special circumstances showing. These parties dispute NYNEX's claims that a significant amount of competition has developed or is developing in its region, and assert that NYNEX has exaggerated the effectiveness or imminence of local exchange service and switched access competition.[77] AT&T notes that NYNEX received over 99 percent of AT&T's 1992 access payments in the NYNEX region and that the total 1992 revenues of competitive access providers in the NYNEX region were equal to 2 percent of NYNEX's 1992 access revenue.[78] MFS says that the data NYNEX presented in this proceeding shows that competitive access facilities are available only to about a thousand buildings in the entire NYNEX region.[79] MCI says that the evidence presented in this proceeding does not show that NYNEX is subject to competition, but merely shows some regulatory changes that "create conditions under which competition could grow, or descriptions of how competitors have 'positioned' themselves for 'future growth' . . . ."[80] MCI submits that all the preconditions for effective local exchange competition do not yet exist and will take substantial time to implement, and that NYNEX's interstate switched access charges, the highest of any major LEC in the country, do not reflect the presence of effective competition.[81] Teleport contends that competitive access providers are not even positioned for switched access competition. Teleport says that conditions that are "necessary prerequisites to the development of local competition" have not been achieved in New York or anywhere else in the NYNEX region.[82] Teleport says that 90 percent of Teleport's New York business is attributable to facilities that are not switched access substitutes.[83]

37. In its reply, NYNEX states that the access billing and competitive access provider revenue numbers that AT&T presented to show that access competition is minimal are misleading. NYNEX notes that the substitution of competitive access provider facilities for LEC access often is not reflected in access billing to an IXC. For example, end users obtain facilities

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do so. According to NYNEX, 83% of the business lines in the two MSAs with boundaries roughly the same as those of LATA 132 are located in wire centers in which competing local exchange service providers have deployed facilities, are providing service, or have announced plans to do so.

[77] See, e.g., AT&T Comments at 5-10; CompTel Comments at 3; Locate Comments at 2; MCI Opposition at 5-6; MFS Comments at 6-7; Teleport Comments at 1, 3-9.

[78] AT&T Comments at 7.

[79] MFS Comments at 6.

[80] MCI Opposition at 5.

[81] Ex Parte Letter from Leonard Sawicki, MCI, to William Caton, Acting Secretary, FCC (Mar. 21, 1995), attachment.

[82] Teleport Comments at 4.

[83] Teleport Comments at 6.

from competitive access providers to connect with an AT&T point of presence to use Megacom and SDN services, which do not use the LEC local switch on the originating end of the call.[84] NYNEX claims that an accurate measurement of NYNEX's share of the special and switched access market in New York State produces a 1993 market share of 84.3 percent.[85] NYNEX also claims that a comparison of revenues understates competitive access provider market penetration because special access services produce lower per-minute revenues than switched services.[86] NYNEX believes a comparison of minutes of use would reveal a much greater presence of competitive access providers.

38. Analysis. We conclude that special circumstances exist that justify the limited waiver described below under the Northeast Cellular standard in a portion of NYNEX's service area. NYNEX has not demonstrated that circumstances justifying a waiver exist outside New York state, or even within New York, outside the New York City metropolitan area. NYNEX has, however, demonstrated that regulatory and economic developments justify the partial grant of its waiver request in the New York City metropolitan area. First, the state regulatory commission and NYNEX have taken a number of steps that remove significant barriers to the growth of competition in the access and exchange markets. Second, competitive service providers are active in the New York City metropolitan area, and are offering alternative sources of supply for many local telecommunications services within much of the LATA. The unusually large concentration of high-volume users in LATA 132 increases the likelihood of significant additional competitive entry. The record information on the degree of competition indicates that the earlier monopoly environment has eroded to a sufficient degree in LATA 132 to enable us to reasonably distinguish it as warranting grant of the waiver described herein.[87] These circumstances generally distinguish LATA 132 from other areas in the country, and justify a limited waiver of certain of our access charge rules at this time.

39. State and federal regulatory decisions, as well as actions taken by NYNEX, have made it more possible for competition to develop in access and exchange telephone markets in LATA 132 than has generally been possible in other parts of NYNEX's service area, or other areas of the country. For instance, basic service competitors are able to interconnect, and have been actively interconnecting, their own transmission facilities at NYNEX's central offices in New York, in accordance with decisions of the NYPSC and this Commission. NYNEX has been required to unbundle its local loops from local switching, which enables competing providers to offer their own switching service in conjunction with resold NYNEX loops (or their

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[84] NYNEX Reply at 8.

[85] NYNEX Reply at 9.

[86] NYNEX Reply at 11.

[87] See supra ¶¶ 24-29.

own loop service in conjunction with resold NYNEX switching).[88] NYNEX has reached agreements with several of its competitors that address issues such as interim arrangements for the mutual compensation for the interchange of traffic and local number portability. NYNEX reached such arrangements with Teleport in July 1994, with MFS in January 1995, and with Cablevision Lightpath in February 1995.[89] In addition, we note that the NYPSC has permitted competition in the provision of all intrastate telecommunications services, including local exchange service, as well as switched access, special access, interLATA and intraLATA toll, and private line. That Commission has certified new competitive entrants as "LECs," and has given them rights comparable to those of incumbent LECs such as NYNEX.[90] While our jurisdiction extends only to interstate telecommunications services, the joint and common character of the facilities providing exchange access and local exchange service means that the regulatory climate for intrastate telecommunications services affects the development of competition in the interstate access market.

40. We conclude that a waiver of our access charge rules is justified in New York State within LATA 132. While we lack sufficient information to reach conclusive findings regarding the precise state of competition in the rapidly-changing telecommunications marketplace, NYNEX has demonstrated that competitive providers have constructed extensive networks, and are beginning to provide service in New York City and many other portions of LATA 132, including the suburban areas north and east of New York City.[91] Moreover, the high volume

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[88] Comparably Efficient Interconnection Arrangements for Residential and Business Links, Case 91-C-1174, Opinion No. 91-24 (issued November 25, 1991) (requires the LEC to unbundle the loop into a "link" and a "port"); Comparably Efficient Interconnection Arrangements for Residential and Business Links, Case 91-C-1174, Order Directing the Filing of Tariffs (issued May 25, 1994) (requiring LECs to file tariffs permitting the resale of the "link" component of unbundled local loop services).

[89] NYNEX News Release, NYNEX Statement on Agreement with MFS, January 25, 1995. Cablevision News Release, Cablevision Systems Signs Cable Industry's First Interconnection Agreement With a Regional Bell Telephone Company, Feb. 16, 1995. Under the direction of the New York commission, NYNEX and its competitors are engaged in efforts to develop technology that would permit full local number portability. Proceeding on Motion of the Commission to Examine Issues Related to the Continued Provision of Universal Service and to Develop a Framework for the Transition to Competition in the Local Exchange Market, Case No. 94-C-0095 (released Mar. 8, 1995).

[90] Regulatory Policies for Segments of the Telecommunications Industry Subject to Competition, Case 29469, Opinion No. 89-12, (issued May 16, 1989) (authorizing competitive provision of non-switched and private line services); Impact of the Modification of Final Judgment and the Federal Communications Commission's Docket 78-72 on the Provision of Toll Service in New York State, Case 28425, Opinion No. 92-13 (issued May 29, 1992); Opinion No. 92-13(A) (issued September 4, 1992) (authorizing competitive provision of switched local services).

[91] See generally Letter from Susanne Guyer, Executive Director-Federal Regulatory Policy Issues, NYNEX, to William Caton, Acting Secretary, FCC, Feb. 17, 1995, Attachment ("Competition in Zones 2 & 3 of LATA 132").

of traffic in certain New York City business districts, such as those in lower Manhattan, enables competitors to carry a substantial amount of telecommunications traffic using relatively few facilities, and presents special opportunities for the development of competition. We conclude that the information provided by NYNEX[92] gives a credible indication that, within LATA 132 in New York State, NYNEX's access and exchange competitors have real opportunities to enter various switched telecommunications service markets and are doing so. Most of the data presented relate to developments in LATA 132. NYNEX has presented relatively little information about markets outside the New York City metropolitan area, and we cannot conclude that grant of the same waiver would be warranted in other areas of New York State outside LATA 132 at this time.

41. Moreover, the circumstances that exist in LATA 132 do not exist in the NYNEX region outside New York State. The regulatory and structural changes occurring in LATA 132 have not occurred to date in the other states in the NYNEX region at a level comparable to those affecting LATA 132. While a number of pro-competitive steps have been taken in Massachusetts, developments there have not advanced as far as those in New York. NYNEX has not demonstrated that competitive access providers are investing capital or deploying services in Massachusetts to a degree comparable to New York. Competition appears to be at an even earlier stage of development in the other states served by NYNEX -- Maine, New Hampshire, Rhode Island, and Vermont -- than in New York and Massachusetts. Thus, we conclude that special circumstances do not exist justifying a similar waiver for NYNEX outside New York State.

42. Several parties have alleged that it is premature to grant NYNEX any additional pricing flexibility. It is not necessary to conclude that fully effective competition in access and exchange telephone markets has already developed in LATA 132 to establish that special circumstances exist that justify this waiver. We find sufficient competitive developments in LATA 132 to justify a limited departure from the pricing rules we have prescribed. We conclude that the public interest will be better served by our granting the additional pricing flexibility described below concurrent with the relaxation of significant market entry barriers, rather than by strictly applying all of our access charge rules despite the special circumstances that exist in LATA 132.

43. The grant of this waiver to address the special regulatory and economic circumstances in LATA 132 provides particular public interest benefits due to the especially high concentration of high-volume toll customers in LATA 132. As described above, steps have been taken in LATA 132 to remove barriers to competitive entry, and there is a significant competitive presence in LATA 132. The particularly high concentration of high-volume toll customers in the area indicates a high demand for access services and a relatively low cost of serving that demand, creating the potential for additional competitive entry. Under these circumstances, it is likely that an entrant with a relatively modest investment in a limited

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[92] See supra ¶ 35.

network could compete for the high-volume toll traffic while avoiding paying NYNEX's carrier common line and transport interconnection charges. Thus, the adverse public interest consequences that could result if these customers move traffic from NYNEX's network to competitive providers' networks in response to the incentives created by our access charge rules are likely to happen more quickly and to be more serious in LATA 132 than elsewhere.

44. Certain elements of our access charge rules -- in particular, the transport interconnection charge and the carrier common line charge -- create incentives, in an environment in which competition is possible, for high-volume users to shift their traffic from NYNEX's switched network to the networks of providers that enter based on the existing cost/price relationship, but that may be less efficient suppliers of telecommunications service (or to shift traffic to more inefficient NYNEX facilities). In the simplest terms, an artificially high price causes toll customers, at the margin, to consume other goods and services rather than purchase a higher, efficient amount of interstate long-distance services. The substantial increase in long-distance volume that occurred after the introduction of subscriber line charges and the resulting decreases in switched access charges and long-distance rates demonstrate that overpriced usage charges do discourage usage.[93] In addition, private line services and partially dedicated services that bypass LEC switches, but not IXC switches, can often be used as a substitute for switched access services. High-volume and even moderate-volume business customers have an incentive to substitute dedicated facilities, which may be the local exchange carrier's special access facilities, or those of an alternative provider, whenever the price of dedicated access is less than the price that the customer would pay for services that use switched access. Switched access pricing that imposes excessive charges on larger users creates an incentive for them to substitute dedicated access for switched access even if the cost the carrier incurs to provide the dedicated access is greater than the cost to the LEC of providing switched access. Such inefficiencies are magnified in an area such as LATA 132 where there are numerous high-volume toll users coupled with the availability of competing services. Finally, artificially high prices of an incumbent may induce additional entry in the expectation that the incumbent's high prices will continue. This may lead a provider that would not be the most efficient supplier of service to invest in facilities producing an inefficient allocation of resources in the economy. Such a result seems particularly likely in LATA 132 as the concentration of high-volume customers would make such inefficient entry even more attractive. For these reasons, given the concentration of high-volume toll users in LATA 132, continued application of certain of our access charge rules is not in the public interest in LATA 132 in the face of growing competition.

45. We conclude that in this case LATA 132 is a reasonable geographic unit for gauging the development of competition. LATA boundaries were defined in proceedings before an antitrust court, were based on technical characteristics of the Bell System in the early 1980s, and are not necessarily reasonable territorial units for assessing competitive developments in all specific geographic market areas. In this case, however, the use of LATA 132 is reasonable.

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[93] See MTS and WATS Market Structure, CC Docket No. 78-72, Report and Order, 2 FCC Rcd 2953, 2954, 2957 ¶¶ 9-11, 29 (1987).

LATA 132 is roughly congruent with the two MSAs (metropolitan statistical areas) that the Census Bureau uses to analyze the New York City metropolitan area. Moreover, LATA 132 is a widely recognized geographic market unit in the telecommunications industry. For example, the NYPSC has established a special short-haul toll rate structure for NYNEX in the LATA, known as the Regional Calling Plan. Emerging competitors providing short-haul toll service must compete against this rate structure. Thus, we conclude that it is reasonable to use LATA 132 to define the geographic scope of this waiver.

46. Finally, we conclude that these real opportunities for access and exchange competition in LATA 132 create special circumstances that justify a waiver of certain of our access rules. In the presence of demonstrated opportunities for competition to grow, we believe it is reasonable to grant NYNEX greater flexibility in the manner in which it recovers certain rate elements than is otherwise permitted under our access charge regime, as discussed further below. Moreover, as we conclude below, a different means of assessing these rate elements is reasonable within LATA 132 and better serves the public interest than would application of our rules.[94]

D. Public Interest Factors

47. Positions of the Parties. Many parties suggest that waivers are not a good vehicle for solving problems described in the NYNEX petition because waivers may delay more generic and comprehensive solutions. Some suggest that a waiver would be improper, or at least unwise, because the NYNEX petition raises fundamental and important questions that should be considered in a rulemaking proceeding.[95] Some oppositions or comments suggest that we should not grant any waivers to alleviate any of the problems described in the NYNEX petition because waivers could reduce the LECs' zeal for access charge reform and because a decision to grant a waiver will provoke other waiver requests that will distract Commission staff.[96]

48. Analysis. We do not find the contentions of the opponents persuasive. This Commission has ample authority to adopt any rule revisions that would serve the public interest

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[94] In light of our conclusion, based on the specific information before us, that a partial grant of NYNEX's proposed waiver is warranted by special circumstances in LATA 132, we find it unnecessary to address the general criteria for determining whether a particular market area is competitive that NYNEX proposes in its recent ex parte filing. We note that similar issues may be addressed in an upcoming notice of proposed rulemaking in our price cap proceeding. See Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket 94-1, FCC 95-132 (released Apr. 7, 1995).

[95] Ad Hoc Opposition at 2; AT&T Comments at 2-3; ALTS Opposition at 4-6; EMI Comments at 6-7; Teleport Comments at 12. Time Warner contends that waivers must be limited to "minor decisions" regarding the application of rules. Time Warner Comments at 2.

[96] Ad Hoc Opposition at 8; ALTS Opposition at 10.

more effectively than existing rules, with or without the support of enthusiastic LECs. We also have ample authority to establish processing priorities for our staff. The special circumstances described above warrant acting affirmatively on the waiver petition now, rather than making NYNEX wait until the Commission can conduct broad-based rulemaking proceedings.

49. We conclude, however, that we should limit the scope of this waiver. We address below the issues raised by NYNEX's proposals regarding local switching, the transport interconnection charge, and the carrier common line charge, and explain why we find that the limited waivers we grant would serve the public interest.

1. Local Switching

50. We do not believe we can resolve on the basis of this record the local switching questions raised by NYNEX. NYNEX claims that the recovery of non-traffic sensitive costs through a per-minute charge exposes NYNEX to special hardships and risks. To support its assertion, NYNEX submitted a series of studies based on its unseparated switching costs that directly assigned costs to broad service categories by employing subaccount level details from the Uniform System of Accounts, other subsidiary records, and the switching cost information system. According to NYNEX, these studies show that a significant portion of the local switching costs are non-traffic sensitive in nature. This Commission has long recognized that relying on usage sensitive charges to recover non-traffic sensitive costs produces some uneconomic results, but we have never definitively determined that the local switching element contains non-traffic sensitive costs. Past Commission discussions regarding the traffic sensitive and non-traffic sensitive components of local switching costs are at best ambiguous, and some statements in prior orders arguably could be construed as finding that it may be difficult to identify non-traffic sensitive costs of digital switches.[97]

51. A determination that some portion of the local switching element represents identifiable non-traffic sensitive costs requires analysis of the functions performed by various switching components accounted for in the local switching separations category and the related costs. While NYNEX's study produces an amount allegedly representing the non-traffic sensitive costs included in the local switching category, NYNEX has not carried its burden of demonstrating the extent to which digital switches are characterized by non-traffic sensitive costs. Based on the present record, we are unable to conclude that NYNEX has properly established the amount of local switching costs, if any, that are non-traffic sensitive in character.

2. Transport Interconnection Charge

52. We established the transport interconnection charge on an interim basis because of the uncertainty surrounding the nature of the costs that are recovered through that charge. In a

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[97] See Amendment of Part 67 of the Commission's Rules, Recommended Decision and Order, 2 FCC Rcd 2551, 2558-60 (Joint Board 1987); and Amendment of Part 67 of the Commission's Rules, Recommended Decision and Order, 2 FCC Rcd 2639, 2640-42 (1987).

pending rulemaking proceeding designed to produce generic solutions for the entire industry, we have sought comment on the nature of the revenues recovered through the transport interconnection charge and the appropriate long-term recovery mechanism.[98] In that proceeding, NYNEX and many other parties submitted comments estimating the makeup of the revenues in the transport interconnection charge, including some alleged subsidy components.

53. NYNEX's proposal in this waiver proceeding to reduce the per-minute transport interconnection charge and recover part of the revenues through a different charge appears not to be related to the estimates of subsidy components in the transport interconnection charge that NYNEX itself submitted in the rulemaking proceeding.[99] Rather, NYNEX's proposal in this proceeding appears to be designed to result in a particular, pre-determined price per minute for switched access. Accordingly, we decline to grant NYNEX a waiver to recover some transport interconnection charge revenues from IXCs on any basis other than a per-minute charge.

54. NYNEX also seeks a waiver to establish different transport interconnection charge rates in different geographic zones, and for multi-line business users and for residential and single-line business users. NYNEX will be permitted to establish four separate rate elements within the interconnection charge category, one for each of the three zones in LATA 132, as well as a baseline element for non-LATA 132 usage, subject to certain conditions discussed below. We conclude that, given the special circumstances that exist in LATA 132 in New York State, the public interest will be served by permitting NYNEX to deaverage the transport interconnection charge by geographic zone. This will permit NYNEX to respond to the growing competition in LATA 132 by lowering its interconnection charge rate on less than a region-wide basis, thus moving its prices towards cost in those areas that have the densest traffic patterns and removing incorrect pricing signals that could trigger entry by competitors that may be less efficient than NYNEX. Therefore, the public interest will be better served by granting the limited waiver of our rules governing the transport interconnection charge rather than it would be from rigid adherence to our current rules.

55. This pricing flexibility, however, is subject to the following conditions. First, NYNEX will not be permitted to raise any interconnection charge rate above the interconnection charge rate that is in its tariff on the day before the tariff implementing this aspect of the waiver takes effect.[100] Thus, NYNEX will not be able to raise the rate for any interconnection charge element to offset a reduction in the rate for another interconnection charge element. Second,

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[98] See Transport Rate Structure and Pricing, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7063-66 (1992).

[99] NYNEX Comments, Transport Rate Structure and Pricing, CC Docket No. 91-213 (submitted Feb. 1, 1993).

[100] Since NYNEX has characterized this waiver as being interim in nature, we have not provided for upward pricing flexibility to reflect increases in the PCI. If we expected this waiver to be of a more permanent nature, we would have considered an upward PCI adjustment mechanism.

NYNEX may not, once it lowers the rate for any interconnection charge element, thereafter raise the rate for that element. This will prevent NYNEX from alternatively raising or lowering the rate for one element deliberately to undermine a rival's business plan. Finally, because some of the revenues recovered through the interconnection charge are transport related, we believe it necessary to establish a floor below which the rate for the interconnection charge may not go. Therefore, we conclude that the rate for any interconnection charge must be sufficient to recover the element's relative share of the tandem switching costs that are included in the interconnection charge category.[101]

56. Deaveraged pricing of the transport interconnection charge, using the zones in LATA 132 that were established for zone density pricing, would enable NYNEX to reduce the charge by a greater degree in Zone 1 offices within LATA 132 than in offices in less dense zones. These Zone 1 offices contain the greatest density of telecommunications traffic and are the offices in which competition is likely to grow most rapidly. The waiver we grant gives NYNEX greater flexibility to move its rates in the direction of cost. The transport interconnection charge includes some revenues related to transport costs, which we have already found are lower in higher-density zones.[102] To the extent that the transport interconnection charge recovers revenues related to the costs of other access elements or other telecommunications services, these costs are likely to be lower in zones with a more dense concentration of traffic.[103] By permitting NYNEX to move its prices towards cost in those areas that have the densest traffic patterns and are open to competitive entry, we will enable NYNEX to minimize distortions in the total switched access per-minute rate that have the greatest adverse impact.

57. Moreover, competitive service providers will be able to use NYNEX's unbundled loops to bypass some of NYNEX's switched access services. Therefore, NYNEX is likely to be under some competitive pressure to reduce its per-minute transport interconnection charge in high-density zones. Given the high density that particularly characterizes LATA 132, permitting NYNEX to deaverage this charge would enable NYNEX to target rate reductions to the customers who are most likely to bypass its switched services in favor of potentially less efficient services. Such customers are particularly likely to be found in Zone 1 of LATA 132 where high-volume toll users are located and competitive entry is permitted, as discussed in paragraph 43, supra. We believe the public interest would be served by giving NYNEX the flexibility to respond in this way to the market conditions that exist in LATA 132, which, in the previous section of this order, we found constitute special circumstances. This action is

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[101] That relative share would be defined by the ratio of the number of interstate access minutes associated with the respective rate element to the total number of NYNEX interstate access minutes.

[102] See Transport Expanded Interconnection Order, supra, 7 FCC Rcd at 7746.

[103] We emphasize that we find only that such a cost relationship is likely; we do not reach a conclusive finding to this effect in this waiver proceeding, nor do we believe such a finding is necessary for us to grant this waiver.

comparable to our grant of zone density pricing of interstate special access and facilities-based transport charges at the same time that we ordered LECs to provide expanded interconnection, which facilitated competition with those LEC services.[104]

58. We decline to permit NYNEX to establish different transport interconnection charge rates for access minutes attributable to multi-line business users and for minutes attributable to residential or single-line business users. Some parties have argued that such a distinction would be unreasonably discriminatory; NYNEX argues to the contrary.[105] Permitting such rate differences in an element like the transport interconnection charge, which recovers costs of an unclear nature, is a more substantial departure from our current practice than deaveraged pricing of that charge by density pricing zones. We conclude that limiting NYNEX's ability to deaverage its interconnection charge rates in a manner consistent with the already existing density zones balances the needs of NYNEX to have pricing flexibility and the developing nature of competition in LATA 132. We find that grant of further pricing flexibility at this time is not supported on the record.

3. Carrier Common Line

59. Positions of the Parties. No party objects to NYNEX's proposal regarding bulk billing of long-term support revenues. In its reply comments, NYNEX made a minor modification to its proposal, basing the bulk billing on an assessment computed using the number of interstate minutes of use originating or terminating in NYNEX's region.[106] None of the commenters appear to object in principle to the use of some form of bulk billing that would effectively guarantee recovery of amounts that NYNEX is required to transmit to other carriers. Many of the parties, however, identify a variety of possible disadvantages that might result from implementation of the plan to recover a portion of the remaining common line revenue requirement through presubscribed line charges.

60. ALTS and Teleport contend that the NYNEX petition does not comply with the criteria adopted in the 1986 Guidelines Order, in which we denied several LECs' petitions for waiver of the Part 69 rules governing their recovery of the common line element, but established guidelines for consideration of new requests for waiver of those rules.[107] ALTS notes that the

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[104] See supra ¶ 12.

[105] See Letter from Susanne Guyer, Executive Director - Federal Regulatory Issues, NYNEX, to William Caton, Acting Secretary, FCC (Mar. 22, 1995), Attachment "Selectively Reducing the Interconnection Charge As Applied To Multi-line Customers and Competitive Zones Is Consistent With the Communications Act."

[106] NYNEX Reply Ex. 10 at 7-8.

[107] ALTS Opposition at 6-10, Teleport Comments at 11 (citing Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules, 104 FCC 2d 1132 (1986) (Guidelines Order), recon.

Guidelines Order required plans to terminate in one year and to assess nationally uniform usage sensitive charges for terminating switched access.[108] ALTS also claims that the Guidelines Order disfavored plans that guarantee exchange carrier recovery of non-traffic sensitive costs.[109] NYNEX responds that the criteria in the Guidelines Order were designed for interim waivers while the Commission completed a then pending proceeding to determine the subscriber line charge formula. Accordingly, NYNEX reasons that the interim period described in the Guidelines Order expired years ago and those interim waiver criteria are not applicable to this petition.[110]

61. Some commenters claim that implementation of the plan will disadvantage end users, including residential customers. Ad Hoc says that adoption of the NYNEX plan could force IXCs to deaverage toll rates,[111] and AT&T says that implementation of the plan would increase pressures to deaverage nationwide toll rates.[112] MFS and ALTS assert that a plan imposing different charges in different areas within a state will create unreasonable discrimination.[113] MFS notes that other zone pricing plans that this Commission has permitted are based upon cost differences between or among zones.[114] NYNEX has not presented evidence to show common line cost differences among zones or LATAs. MFS, ALTS and EMI also contend that the NYNEX plan produces end user discrimination between business customers with multiple lines and other customers.[115]

62. NYNEX assumes that changes in access charges will be flowed through in a manner that affects end user choices. Most of the pleadings do not challenge that assumption. Cable & Wireless says that marketplace forces in the interexchange market will compel IXCs to flow

denied, 2 FCC Rcd 28 (1987)).

[108] ALTS Opposition at 2.

[109] ALTS Opposition at 7.

[110] NYNEX Reply at 21-22.

[111] Ad Hoc Opposition at 2,5.

[112] AT&T Comments at 18 n.31. The Comments of John Staurulakis, Inc. at 1-3 and the NTCA Reply at 2-4 also express concern that the NYNEX plan could lead to toll rate deaveraging.

[113] MFS Comments at 9-12, Reply at 5-6; ALTS Opposition at 9. The AT&T Reply at 5-6 and the EMI Reply at 2 express the same concern.

[114] MFS Comments at 10.

[115] MFS Comments at 9; ALTS Opposition at 9; EMI Comments at 9.

through reductions in access charges.[116] The New York Clearing House Association, however, asserts that there is a substantial chance that the IXCs will not flow through the access charge reductions and suggests that we modify the NYNEX plan to require a flow through.[117]

63. Several parties assert that substituting an assessment per presubscribed line for an assessment per access minute will create an incentive for IXCs to avoid serving low-volume users. Each presubscription would increase IXC costs and the low-volume users would not add enough revenues to offset the additional costs.[118] AT&T notes that the Guidelines Order rejected an alternative non-traffic sensitive cost recovery proposal by US West that would have had that effect.[119]

64. Several parties contend that implementation of the plan will unfairly disadvantage some IXCs. Some noted that a presubscribed line assessment in one region could create a windfall for regional IXCs who do not originate traffic in the region.[120] Such carriers would not pay access charges for terminating traffic while carriers that originate inter-regional calls in the NYNEX region would pay charges for all of NYNEX non-traffic sensitive costs plus per access minute terminating charges to another LEC. The Sprint reply suggests that any single region presubscribed line charge be limited to originating traffic in order to avoid that problem.[121] The NYNEX reply contends that it is reasonable to recover common line costs from IXCs that originate traffic. NYNEX says the presubscribed line charge is a surrogate for the end user common line charge and that charge recovers costs for both originating and terminating usage from the subscriber.[122]

65. Some IXCs claim that adoption of the NYNEX plan would be prejudicial to IXCs because it would be difficult or impossible for them to verify the minutes attributable to multi-or single-line usage.[123] CompTel says that it would also be difficult for IXCs to verify the number

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[116] Cable & Wireless Comments at 7-8.

[117] New York Clearing House Association Comments at 5-6.

[118] AT&T Comments at 18, Reply at 1-2; ALTS Opposition at 8-9; RCI Comments at 10; EMI Comments at 3-4; Teleport Comments at 11.

[119] AT&T Comments at 18; See Guidelines Order, supra, 104 FCC 2d at 1182-83.

[120] AT&T Comments at 15-17, Reply 1-2,7; CompTel Comments at 8; RCI Comments at 9-10; EMI Comments at 3,10; MFS Comments at 18-19.

[121] SPRINT Reply at 7.

[122] NYNEX Reply at 30.

[123] CompTel Comments at 7; RCI Comments at 8; EMI Comments at 9-10.

of presubscribed lines attributable to a particular carrier.[124] In its reply, NYNEX notes that its plan included auditing provisions and says that it will modify that commitment to include more frequent audits, to explore the possibility of sample audits of individual IXC bills, and to work with IXCs to identify the data that access customers require for bill verification.

66. MFS and LOCATE contend that a presubscribed line plan is objectionable because charges based upon presubscribed lines tend to insulate NYNEX from the effects of competition by guaranteeing the recovery of non-traffic sensitive costs even if NYNEX does lose business to switched access competitors.[125] ALTS also claims that a presubscribed line plan guarantees the recovery of NYNEX non-traffic sensitive costs. ALTS contends that such a result is objectionable because it shifts business cycle risks between NYNEX and the IXCs and such a shift in risks violates criteria for alternative non-traffic sensitive cost recovery plans adopted in the Guidelines Order.[126] NYNEX replies that MFS did not understand the annual price cap adjustment in the NYNEX plan: "Within the Common Line basket, the per-line charge would be recalculated each year to maintain the same amount of revenues as would have [been] generated by the per MOU CCL rate."[127] NYNEX also asserts that the NYNEX plan does not guarantee the recovery of NYNEX revenues during the access year because NYNEX revenues would decline if NYNEX "lost access lines to competition . . . ."[128] Therefore, NYNEX contends that its plan does not guarantee the recovery of non-traffic sensitive costs.[129]

67. Analysis. We conclude that NYNEX's alternative plan for recovering carrier common line revenues is in the public interest within LATA 132 in New York State. The NYNEX waiver requests relating to the carrier common line element do not present unresolved questions with respect to the nature of the costs that are reflected in that element. We have long recognized that common line charges recover non-traffic sensitive costs; the recovery of some common line costs through usage charges causes heavy users of switched interexchange services to subsidize other users of telecommunications services; and the inclusion of such subsidies in access charges produces results that detract from economic efficiency.[130] When we established

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[124] CompTel Comments at 7.

[125] MFS Comments at 13-16; LOCATE Comments at 3.

[126] ALTS Opposition at 6-8.

[127] NYNEX Reply at 28.

[128] Id.

[129] Id. at 29.

[130] See especially MTS and WATS Market Structure, CC Docket 78-72, Phase 1, 93 FCC 2d 241 ((1983) (Third Report and Order)(Access Order), modified on recon., 97 FCC 2d 682 (1983) (First Reconsideration), modified on further recon., 97 FCC 2d 834 (1984), (Second Reconsideration), aff'd

the access charge rules, we limited the recovery of common line costs through subscriber line charges in order to avoid establishing those charges at a level that might pose some risk to universal service. The access charge rules established carrier common line charges to enable LECs to recover the remainder of the common line costs that are not recovered through subscriber line charges paid by end users.

68. We first consider the relevance of our 1986 Guidelines Order, which some parties argue precludes grant of NYNEX's requested waiver. We then consider the issues raised regarding NYNEX's requested mechanism for recovering its long-term support obligations. Finally, we address the public interest implications of NYNEX's requested recovery mechanism for its own common line costs.

69. Effect of the Guidelines Order. In late 1985 and early 1986, a number of LECs filed petitions for waiver of those portions of Part 69 of the Commission's access charge rules governing their recovery of the common line element. The carriers proposed a variety of alternative recovery mechanisms. In late 1986, the Commission adopted the Guidelines Order, which denied the pending waiver requests, but established various guidelines for Commission consideration of new requests for waiver of those rules.[131] In 1987, the Commission, upon recommendation of a Federal-State Joint Board, implemented a plan for increasing the recovery of common line costs through the residential subscriber line charge from $2.00 per month to $3.50 per month.[132]

70. In view of our 1987 decision changing the method for recovering common line costs, as well as the many other changes in regulation and market conditions that have occurred since 1986, we conclude that the criteria in the Guidelines Order are no longer controlling with respect to our decision to grant or to deny a waiver to recover some non-traffic sensitive costs in an alternative manner. By its terms, the Guidelines Order was intended to provide LECs with flexibility during a limited interim period that would not limit the Commission's ability to devise a permanent plan for recovery of non-traffic sensitive costs. That interim period has long since expired. In particular, the requirements of the Guidelines Order were addressed to a monopoly market, while the waiver request under consideration alleges an increasingly competitive

in principal part, National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1085 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985), modified on further recon., 99 FCC 2d 708 (1984) (Third Reconsideration), aff'd, American Tel. and Tel. Co. v. FCC, 832 F.2d 1285 (D.C. Cir. 1987), modified on further recon., 101 FCC 2d 1222 (1985) (Fourth Reconsideration), recon. denied, 102 FCC 2d 849 (1985) (Fifth Reconsideration).

[131] See Guidelines Order. Those guidelines limited the alternatives to a capacity charge model and end user charge model. All alternative cost recovery plans were to expire in one year, were limited to originating usage, and were to be designed to preserve the common line pooling arrangement and the non-premium access discount in offices that did not have equal access.

[132] MTS and WATS Market Structure, 2 FCC Rcd 2953 (1987).

marketplace. We note, however, that to the extent the Guidelines Order recognized that some alternatives to the per-minute carrier common line charge that do not affect the level of subscriber line charges might produce better results than charges to IXCs based on access minutes, NYNEX's petition in this proceeding is generally consistent with the Guidelines Order.

71. Long-Term Support Obligations. Long-term support payments do not reflect NYNEX costs at all. Rather, that portion of the common line revenue requirement recovers amounts that NYNEX is required to transmit to other LECs to recover some of their non-traffic sensitive costs. The inclusion of long-term support in a per-minute switched access charge handicaps NYNEX in competing with any switched access offerings of competing access providers. The competing providers could base their prices on their own costs without including costs of other access providers in other areas.

72. None of the comments and oppositions appear to object in principle to the use of some form of bulk billing that would effectively guarantee recovery of amounts that NYNEX is required to transmit to other carriers. Imposing a collection risk upon NYNEX by retaining long-term support recovery in the per-minute carrier common line charge applicable in LATA 132 would be unfair under the competitive circumstances of LATA 132, and would not produce any economic efficiency benefits. Given the special circumstances in LATA 132, specifically the increased potential for exchange and access competition in that area, we conclude that permitting NYNEX to recover its long-term support costs in the manner described in the NYNEX reply (bulk billing based on IXCs' market share of minutes originating and terminating in LATA 132) is in the public interest because it avoids distortions in consumer choices and provider investment decisions. In view of our decision to limit the geographic scope of the waiver, such bulk billing would be limited to the portion of long-term support obligation that is currently recovered through carrier common line charges attributable to LATA 132 usage.

73. NYNEX's Own Common Line Costs. We conclude that a waiver of our rules relating to the recovery of NYNEX's carrier common line revenues relating to its own common line costs in LATA 132 would also produce public interest benefits in light of the special circumstances that exist in LATA 132. First, we conclude that a waiver is in the public interest to avoid interference with the continuing development of interstate access competition. As previously noted, a usage charge for non-traffic sensitive costs creates a subsidy from high-volume users to low-volume users. Business users with multiple lines are likely to be high-volume users of interexchange services. Consequently, most of NYNEX's carrier common line charges associated with minutes originating from or terminating to business customers with multiple lines represent a subsidy to recover other end users' interstate common line costs.[133] The ill effects of such inefficient pricing, such as encouraging inefficient entry, will be greater

[133] NYNEX's cost per subscriber line in New York is $6.27. NYNEX 1994 Annual Access Tariff Filing, Transmittal No. 288, Section 2.1, App. 1 at 1, App. B at 6. Thus, the first 33 minutes of calling by a multi-line business customer in a month would cover the $0.27 cost of the subscriber line above the $6.00 cap at the CCL rate of $0.008248. The revenues from the remaining minutes each month support lower rates for other users.

in areas, such as LATA 132, that have an especially high concentration of high-volume users and are open to new entrants and growing competition.[134] In an environment characterized by increasing opportunities for competition, rules that raise LEC per-minute charges for access services to levels that are substantially higher than the underlying cost of those services could encourage inefficient entry by competitive service providers, while impeding NYNEX's ability to respond to developing competition.[135] These effects will, of course, be limited to areas in which entry is possible. NYNEX has demonstrated that LATA 132 is such an area.

74. In addition to facilitating the development of competition in the interstate access market, the NYNEX plan should serve the public interest insofar as it results in per-minute interstate switched access rates that are closer to cost. Matching interstate access rate structures and levels more closely with economic costs, especially in an area with a high concentration of high-volume users, such as LATA 132, should both stimulate the potential growth in the purchase of access services and reduce LEC costs in providing such services. These developments should, in turn, increase overall consumer welfare and lead to lower overall access costs. Artificially high rates suppress demand, encourage customers to shift traffic to alternative carriers that may not be the most efficient providers, and produce incorrect market entry signals. The public interest will be served by granting a limited waiver because of the substantial adverse effects that will result from rigid adherence to our common line pricing rules under the special circumstances described above.

75. Moreover, the NYNEX plan is likely to produce immediate, additional benefits to the extent that IXCs, in turn, lower their rates for high-volume users to reflect the reductions in the per-minute carrier common line charges assessed by NYNEX. It is reasonable to expect IXCs to pass along access charge reductions to high-volume customers in LATA 132 because of the competition for those customers' toll service and the individualized nature of many of the service offerings. By contrast, an access charge reduction by a single LEC is unlikely to have a substantial impact on basic message telephone service (MTS) long-distance rates because those rates are established on a nationwide averaged basis. We conclude that competitive conditions in interexchange markets are likely to cause IXCs to respond to changes in access pricing with changes in long-distance pricing that will affect the choices that business customers with multiple lines make. We conclude that the likelihood that multi-line business customers will experience long-distance rate reductions is a factor weighing in support of our conclusion that the waiver proposal is in the public interest. We decline, however, to adopt the New York Clearing House Association's suggestion that IXCs be required to flow through access charge reductions to their business customers in this order granting a waiver to NYNEX. We would prefer to consider imposition of requirements upon persons other than the petitioner in separate proceedings.

76. We conclude that many of the potential disadvantages of NYNEX's common line plan raised by opposing parties are either unlikely to occur or are not likely to have sufficient

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[134] See supra ¶¶ 43-44.

[135] See supra ¶¶ 26-29.

impact to outweigh the potential benefits. For example, we conclude that IXCs are unlikely to respond to the NYNEX plan by changing the geographically averaged nature of their basic offerings designed for residential and small business customers. Our decision to limit the waiver to LATA 132 makes such a result even more unlikely. The NYNEX plan appears less likely to discourage IXCs from serving low-volume users than the U S West plan that was rejected in 1986. U S West had proposed to base interexchange carrier assessments on the number of presubscribed customers rather than the number of presubscribed lines. A per-customer assessment would create an even greater incentive to discourage presubscription by low-volume, single-line customers. The U S West plan also would have been implemented in the mid-1980s when the initial presubscription process was still in progress. There was accordingly greater reason for concern about the possible impact of changes in access charge assessments upon the presubscription process. The per-customer assessment that U S West proposed would also have been much higher than the assessment NYNEX has proposed because the costs to be recovered through carrier common line charges were much greater in 1986 than they are now. More importantly, the U S West plan would have been implemented in a multi-state region, while we have decided to limit any NYNEX waiver to LATA 132. Interexchange carriers are far less likely to change their marketing methods for services residential customers use if the changes in access assessments to interexchange carriers are confined to such a limited area. Being the presubscribed long-distance carrier for a customer provides additional opportunities to sell related products and services to that customer.

77. We also conclude that price differences between LATA 132 and other areas in New York State or the NYNEX region are not likely to result in unreasonable discrimination. Given the density of traffic in LATA 132, costs are likely to be lower there than elsewhere in NYNEX's region. As described in paragraph 43, supra, the problems that per-minute recovery of non-traffic sensitive costs create for the economy and for LECs are particularly acute in that area because of the concentration of high-volume toll users in LATA 132, which is open to, and is realizing actual, competitive entry. Moreover, it is prudent initially to limit application of such an alternative recovery mechanism, at least until we have an opportunity to observe actual results.

78. The contention that NYNEX's common line plan would result in unreasonable discrimination between business customers with multiple lines and other customers is incorrect. If the plan results in a reduction of charges to the business customers who indirectly pay more than their share of non-traffic sensitive costs under the current system, the plan will, in fact, reduce discrimination among end users.

79. We decline to limit the application of the NYNEX carrier common line plan to originating traffic. Inasmuch as we have already decided to limit the access elements affected by a waiver and to limit the geographic scope of the waiver, the exclusion of terminating access charges might make the effects of the plan too limited to produce meaningful benefits. In addition, we find it unlikely that competitive IXC presence in LATA 132 will be significantly diminished by the grant of this waiver. NYNEX incurs common line costs in proportion to the

number of lines, and thus it is not unreasonable to recover these costs from IXCs on the basis of the number of lines presubscribed to each carrier.

80. In view of NYNEX's commitments to provide for frequent auditing and to work with IXCs to identify data needed for bill verification, we believe that auditing and verification should not present any insurmountable problems.

81. The NYNEX common line plan does not guarantee that NYNEX will retain revenues that NYNEX might lose under existing rules. In implementing its presubscribed line charge plan for the CCL charge, NYNEX will recalculate the presubscribed line charge each year. Under the annual price cap adjustment, NYNEX will compute its CCL rate at the level that would have been used if no waiver had been granted. This CCL rate will be adjusted for LATA 132 to reflect the recovery of long-term support costs through a bulk-billing mechanism. The minutes attributable to LATA 132 business customers with multiple lines will then be multiplied by the new CCL rate for LATA 132 to produce an amount to be recovered through the per presubscribed line charge. That amount will be divided by the number of presubscribed lines in LATA 132 supplied by NYNEX during the relevant base period to produce the per presubscribed line charge for the following access tariff year. The annual price cap adjustment is designed to produce annual revenues for NYNEX and aggregate annual IXC access costs that do not differ significantly from those that application of the existing access charge and price cap rules would produce.

82. The substitution of presubscribed line charges for access minute charges would, however, produce some change in risks and rewards during the course of any given year during which an access tariff remains in effect, because usage is likely to fluctuate over the course of the year more than the number of local loops will fluctuate. This would presumably be true whether changes in demand were attributable to switched access competition, business cycle fluctuations, or business and population migration in or out of a particular LATA, state or region. The actual effects of demand fluctuations upon fluctuations in NYNEX or IXC earnings may, of course, be quite modest. We do not believe that a reduction in NYNEX risks or rewards that results from recovering non-traffic sensitive costs on a per-line basis would be inequitable. Recovery of per-line costs on a per-line basis would produce a better match between cost fluctuations and revenue fluctuations than recovery of per-line costs on a per-minute basis. NYNEX common line revenues will vary with the number of lines provided. If NYNEX loses subscriber lines because of local exchange competition, it will lose corresponding subscriber line charges as well as the flat, per-line charge permitted by this order. Thus, NYNEX is not held harmless.

83. We conclude that the probable advantages of the modified NYNEX plan for recovery of some common line costs in LATA 132 through presubscribed line charges outweigh the probable disadvantages of such a plan. Implementation of the waiver will, of course, require modifications in the plan NYNEX has described to reflect the limitation to LATA 132 and the modifications described in Appendix 10 of NYNEX's reply comments. The usage requirements and line counts should reflect LATA 132 usage and line counts, rather than lines or usage in the

New York study area or the entire NYNEX region. Finally, if the tariffs implementing the transport interconnection charge component of this waiver are filed after the tariffs implementing the Commission's recent decision on LEC price cap performance review are filed, NYNEX may amend the tariffs implementing the LEC price cap performance review order.[136] Such tariff changes shall be filed on not less than forty-five days' notice, to become effective August 1, 1995.

VI. ORDERING CLAUSES

84. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. §154(i), and Section 1.3 of the Commission's rules, 47 C.F.R. §1.3, that the Petition for Waiver filed by the NYNEX Telephone Companies on December 15, 1993, IS GRANTED IN PART and DENIED IN PART subject to the limitations and conditions described herein.

85. IT IS FURTHER ORDERED that Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59, ARE WAIVED for the purposes outlined in Paragraph 80. NYNEX shall cite the "FCC" number of this Order as its authority.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[136] Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket 94-1, FCC 95-132 (released Apr. 7, 1995).

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: NYNEX Telephone Companies. Transition Plan to Preserve Universal Service in a Competitive Environment. Petition for Waiver

In December 1993. NYNEX filed a petition for waivers of the Commission's rules to enable NYNEX to implement its Universal Service Preservation Plan ("USPP"). In particular. the NYNEX petition for waiver of the Commission's access charge and price cap rules (Parts 61 and 69) seeks (1) to reduce per-minute access charges for the carrier common line. local switching, and transport interconnection charges throughout its entire region. and to recover most of the lost revenues from long-distance carriers in a manner other than that prescribed in the rules; and (2) a waiver of the price cap rules to provide additional pricing flexibility. NYNEX contends that it needs to reduce per-minute access charges in order to meet switched access competition and to enable access charge structures to reflect the effects of competition. especially in the New York City metropolitan area.

This Memorandum Opinion and Order, based on state and federal regulatory changes as well as steps taken by NYNEX to create an environment open to competitive entry for exchange and access services in the New York City metropolitan area. In this Order, the Commission grants in part the waiver request only with respect to the carrier common line charge in LATA 132. The common line waiver would permit NYNEX to recover long term support costs through an assessment based on toll minutes and to recover some of the remaining common line costs through a presubscribed line charge. The Order also grants some additional downward pricing flexibility for transport interconnection charges in LATA 132.

I write to emphasize several aspects of this Order including its context in light of other issues regarding competition in access and local exchange that are currently before the Commission. First. given the substantial presence of competing access providers (CAPs) in the New York City metropolitan area, I support this decision because of the importance of taking proactive steps to remove regulatory barriers that inhibit the further development of exchange and access competition. In doing so, this decision provides a more certain basis for investment. as well as the consumer and industry benefits, that are precluded by NYNEX's current access charge structure that fails to reflect the effects of competition by lumping these charges with unrelated costs, thereby preventing lower recovered access costs. In this regard. the limited waiver for LATA 132 is appropriate to reflect that data regarding evidence of entry and activity by CAPs has not been presented to reflect similar conditions outside LATA 132 in the remainder of the NYNEX region.

This decision also continues the review of access reform plans currently before the Commission. including our previous decision on the Rochester Open Market Plan and a pending

proposal by Ameritech.[1] Along with the Commission's recent decisions on expanded interconnection and LEC price caps,[2] these access reform plans will continue to establish the terms under which a greater level of competing service will be offered to end users, especially to the extent that we are not yet at a point where the public can rely solely on the market to set prices for all services, especially with respect to services provided to residential areas. I also look forward to addressing the issue of rate structures in an evolving competitive environment in the context of the Further Notice of Proposed Rulemaking on LEC price caps.[3] I continue to believe that changes in the local exchange marketplace, such as those competitive conditions demonstrated in LATA 132, will underscore the importance of transitioning toward a streamlined regulatory structure that would recognize instances where sources of competition are evident in the local marketplace.

I am concerned, however, given the number of access reform waivers presented to the Commission, that important public consequences may result from treating these and subsequent access reform issues on a waiver basis rather than establishing a set of principles or general guidelines for evaluating future market situations. As a result, I believe that it may be necessary for the Commission to take the further initiative in a rulemaking to establish criteria or guidelines for the competitive and regulatory changes that will warrant granting flexibility in access charge structures.

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[1] See Memorandum Opinion and Order, Rochester Telephone Corporation Petition for Waivers to Implement its Open Market Plan (released march 7, 1995); Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region (filed March 1, 1993).

[2] See Expanded Interconnection with Local Telephone Company Facilities,CC Docket No. 91-141, Memorandum Opinion and Order, (adopted July 14, 1994). See Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No. 94-1, FCC 95-132 (released April 7, 1995).

[3] See Price Cap Performance Review for Local Exchange Carriers, First Report and Order, CC Docket No 94-1, FCC 95-132 (released April 7, 1995).

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: *NYNEX Telephone Companies' Petition for Waiver; Transition Plan to Preserve Universal Service in a Competitive Environment*

Today, based on changing competitive conditions in New York City and Long Island, we grant NYNEX a limited waiver of interstate access charge rules. I wholeheartedly support this decision.

Our action today demonstrates our steadfast determination to promote local competition at every opportunity. The Commission has expended considerable time and energy in the effort to bring competition to the local delivery of multichannel video programming, via video dialtone. We also seek to encourage competition in local telephone services. The waivers we granted last month for Rochester Telephone represented one modest contribution on our part to the development of a more competitive local telephone marketplace. Today's action is another timely step forward.

This decision also illustrates our responsiveness to changing circumstances. We must not let our hopes distort our perception of realities, but genuine and substantial marketplace changes should be accommodated with corresponding measures of regulatory flexibility. In this instance, we are waiving our rules upon a compelling showing of special circumstances, based on our assessment of the present market conditions and future prognosis for competition in LATA 132 -- and our confidence that consumers throughout NYNEX's service area will be protected against negative impacts.

Our decision today is testimony to the importance of cooperation in the construction of a new competitive framework. The New York Public Service Commission has shown extraordinary leadership in creating conditions for increased competition. NYNEX has embraced change instead of fighting it, allowing competitors to collocate their equipment in NYNEX's offices and

successfully negotiating mutual compensation and other complex issues with several competitive service providers. Those providers have relentlessly sought to accelerate the pace of change -- and to make the benefits of competition more widely available. I applaud them all.

The significance of today's ruling should not be overstated. Our action here is an individualized waiver, not our final blueprint for the transition to competition. Even in the New York marketplace, barriers to competition still remain, and robust, sustainable competition is not yet guaranteed. Accordingly, we will need to monitor closely the results of today's action in LATA 132 -- and improve our tools for assessing when competitive developments in other markets may justify waivers or rule changes.

As we continue our focus on local competition, we must remain attentive to the interplay between competition and universal service. Competition brings lower prices and increased choices for consumers (among other benefits), and it can thereby help us fulfill our universal service responsibilities by making services more attractive and accessible. But in today's environment universal service depends on subsidy flows that will not be altogether sustainable in a changed environment. We therefore need to reevaluate our universal service objectives and mechanisms in light of emerging competition, and we are doing just that within this agency and in collaborative efforts with state regulators and the National Telecommunications and Information Administration.

Meanwhile, we must press relentlessly forward with efforts to promote competition, as we are doing today.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: The NYNEX Telephone Companies' Petition for Waiver, Transition Plan to Preserve Universal Service in a Competitive Environment

"Timing is everything." That often-used adage has particular relevance in the context of this proceeding. As we move along the continuum from monopolistic exchange and access markets toward a more competitive environment, we confront a classic regulatory dilemma involving timing: When is it appropriate to afford an incumbent, monopolistic service provider pricing flexibility in order to address competitive challenges from new entrants?

If pricing flexibility comes too early, the incumbent might use that flexibility in ways that could thwart nascent competition, contrary to the public interest. For example, the incumbent might exercise market power that it possesses over other services to cross-subsidize prices for more competitive services in order to undercut new entrants and drive competitors from the market. Similarly, pricing flexibility that comes too late presents other public interest difficulties. To the extent that existing regulation (devised in a monopoly environment) continues to require an incumbent to price certain services substantially above relevant costs in order to subsidize lower prices for other services, such above-cost prices send distorted signals to new entrants and consumers. In such circumstances, inefficient investment and entry decisions may result, consumers may pay higher rates, and the incumbent might suffer a loss of market share through no fault of its own.

The trick, then, is to grant flexibility to the incumbent while competition is taking hold – neither too early, nor too late. This is not an easy task, but we must not shrink from it. If our timing is right, all competitors can compete fairly in the marketplace on price, innovation and service quality. If we are on target, consumers, rather than regulation, will determine winners and losers in the marketplace.

The record in this case demonstrates that the competitive environment in the New York City metropolitan area has advanced to the stage that it is appropriate to grant NYNEX some pricing flexibility through a limited waiver of our access charge rules. Given the uncommon nature of competitive development and the large concentration of high-volume business customers in this particular area, continued strict adherence to our existing pricing rules would not serve the public interest in facilitating fair, vigorous and efficient competition in the New York City metropolitan area. Rather, deviation from the existing rules in these circumstances will better serve these public interest goals. I support

this decision because I believe that NYNEX has demonstrated good cause for a limited waiver of our rules at this time. I emphasize, however, that our action is based on the competitive circumstances that have been developed on the record before us. Any future requests for similar or different pricing flexibility by NYNEX in other areas, or by other carriers, will stand or fall on their own merits.

Finally, I believe that we must get on with the business of reforming our regulation to facilitate and accommodate the emergence of competition in exchange and access markets. I believe we need to closely examine our Part 69 access charge pricing rules to see if they enable carriers to recover their costs in a rational, efficient manner as we transition to more competitive markets. Likewise, I believe that we need to challenge existing notions and mechanisms regarding universal service. While our commitment to universal service should not waver, all subsidies supporting universal service – both explicit and implicit – should be examined to see whether they continue to make sense in today's rapidly changing world of telecommunications.

I end where I began – "timing is everything." I believe the time is right to afford NYNEX the limited pricing flexibility described in this order. As competition begins to emerge in a specific area, the old ideas and approaches that were developed in a monopoly environment are sorely tested, as the NYNEX situation demonstrates. But beyond considering individual requests by carriers for pricing flexibility, I believe the time is also right to undertake a broader examination of our access charge and universal service rules and policies to see if we can adjust our regulation to foster the inevitable tide of competition. In my view, it is important that we begin this process as soon as possible. I urge my colleagues to give these issues a high priority.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Petition of the People of the	)	PR Docket No. 94-105
State of California and the Public	)	
Utilities Commission of the State	)	
of California To Retain Regulatory	)	
Authority over Intrastate Cellular	)	
Service Rates	)	

REPORT AND ORDER

Adopted: May 5, 1995; **Released:** May 19, 1995

By the Commission: Commissioner Chong not participating.

I. INTRODUCTION

1. On August 8, 1994, the Public Utilities Commission of the State of California (hereinafter "California" or "CPUC"), on behalf of that State, petitioned us to retain state regulatory authority over the rates for intrastate commercial mobile radio services ("CMRS").[1] Eighteen parties filed pleadings opposing the petition, and four parties filed pleadings supporting it.[2] By this action, we deny the Petition because it fails to satisfy the statutory standard Congress established for extending state regulatory authority over CMRS rates.

[1] Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain State Regulatory Authority over Cellular Service Rates, PR Docket No. 94-105, filed Aug. 8, 1994 (hereinafter "California Petition" or "CPUC Petition").

[2] A list of parties that filed pleadings in this proceeding appears at Appendix A.

II. BACKGROUND

2. In 1993, Congress amended the Communications Act ("Act") to revise fundamentally the statutory system of licensing and regulating wireless (*i.e.*, radio) telecommunications services.[3] Among other things, Congress: (1) established new classifications of "commercial" and "private" mobile radio services ("CMRS" and "PMRS," respectively) in order to enable similar wireless services to be regulated symmetrically in ways that promote marketplace competition;[4] (2) reallocated up to 200 megahertz of spectrum from government to private use so as to expand opportunities for innovative utilization of spectrum by the private sector;[5] and (3) authorized competitive bidding as a means of improving licensing efficiency within the context of the Act's public interest goals, which include promoting investment in new and innovative wireless telecommunications technologies.[6]

3. Congress also provided that, as of August 10, 1994, no state or local government shall have authority to regulate "the entry of or the rates charged" for CMRS and PMRS services, although states are permitted to regulate the "other terms and conditions" of CMRS.[7] As an exception to this general rule, Congress also provided that, if a state had "any regulation" concerning the rates for any commercial mobile radio service in effect as of June 1, 1993, it could retain its rate regulation authority by petitioning the Commission no later than August 9, 1994, and demonstrating that either: (1) "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory;" or (2) "such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State."[8]

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[3] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 ("OBRA" or "Budget Act"), *codified in principal part at* 47 U.S.C. § 332.

[4] *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1417-18 (paras. 11-13) (1994) (*CMRS Second Report and Order*), *reconsideration pending*.

[5] National Telecommunications and Information Administration Organization Act, § 113(b)(1).

[6] The competitive bidding methodology is to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays ...." 47 U.S.C. § 309(j)(3)(A). Regulations for the conduct of such auctions, when they prescribe area designations and bandwidth assignments, are required by OBRA to promote "investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(C)(iii).

[7] *See* 47 U.S.C. § 332(c)(3)(A).

[8] *See* 47 U.S.C. § 332(c)(3)(B).

4. In our proceeding to implement OBRA, we concluded that, since Congress intended generally to preempt state and local rate and entry regulation of CMRS, a state seeking to retain regulatory authority must "clear substantial hurdles" in demonstrating that continued regulation is warranted.[9] We also determined that the nature of a state's burden of proof is delineated generally by the statute itself. Specifically, we found that:[10]

> [I]n implementing the preemption provisions of the new statute, we have provided that states must, consistent with the statute, clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers. While we recognize that states have a legitimate interest in protecting the interests of telecommunications users in their jurisdictions, we also believe that competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [*sic*] a burden to the development of this competition. Our preemption rules will help promote investment in the wireless infrastructure by preventing burdensome and unnecessary state regulatory practices that impede our Federal mandate for regulatory parity.

5. We also concluded that, while a state should have discretion to submit whatever evidence it believes is persuasive, a petition to retain regulatory authority must be grounded on demonstrable evidence.[11] In that regard, we adopted Section 20.13 of our Rules as a guide to the kinds of evidence and information that we would consider to be pertinent and helpful to our consideration of a state petition.[12] Moreover, in addition to the evidence, information, and analysis that a state must submit, we determined that a petitioning state also is required to identify and provide a detailed description of the specific existing or proposed rules that it would continue or establish if we were to grant its petition.[13] We noted that the standards for preemption established in *Louisiana PSC* do not apply to petitions submitted under Section 332 of the Act, nor to Section 20.13 of our Rules.[14] In *Louisiana PSC* the

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[9] *See CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[10] *Id.*, 9 FCC Rcd at 1421.

[11] *Id.*, 9 FCC Rcd at 1504.

[12] 47 C.F.R. § 20.13.

[13] *See CMRS Second Report and Order*, 9 FCC Rcd at 1505.

[14] Under *Louisiana PSC*, the Commission may preempt state regulation of intrastate service when it is not possible to separate the interstate and intrastate components of the asserted Commission regulation. Louisiana Pub. Ser. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). In construing the "inseparability doctrine" recognized by the Supreme Court in *Louisiana PSC*, Federal courts have held that where interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the states, state regulation of the intrastate service that affects interstate service may be preempted where the state regulation thwarts or impedes a valid Federal policy. *See*

Supreme Court found that Section 2(b) of the Communications Act prohibits the Commission from exercising Federal jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services."[15] Here, Congress has explicitly amended the Communications Act to preempt state and local rate and entry regulation of commercial mobile radio services without regard to Section 2(b).

III. DECISIONAL FRAMEWORK

6. The pleadings present two threshold procedural matters that we must address before addressing the CPUC's Petition on its merits. First, some parties argue that the petition is fatally flawed because it requests regulatory authority only over cellular service rather than all CMRS services, thereby violating what these opponents claim is the fundamental OBRA goal of achieving symmetrical regulatory treatment of CMRS. Second, the parties take issue with each other's characterizations of the appropriate burden of proof in this proceeding.

A. Cellular-Only Regulation

1. Pleadings of the Parties

7. Various opponents of the petition argue that: (1) Congress revised Section 332 to establish regulatory parity, remedy the disparate regulatory treatment of similar forms of CMRS, and create a uniform, nationwide regulatory regime; (2) by seeking to impose regulation only on cellular services, the CPUC would impose inconsistent regulations on different CMRS providers, thereby creating precisely the asymmetrical regulatory conditions Congress sought to remedy; and (3) accordingly, the CPUC's petition must be rejected because it seeks to impose a type of regulatory regime expressly rejected by Congress.[16] A variant of this argument also is present in the record. Essentially, some opponents of the petition argue that: (1) regulatory parity is required by statute; (2) in order to regulate *any* CMRS a state must demonstrate that market conditions warrant regulating *all* CMRS; (3) the CPUC has not submitted a showing on non-cellular CMRS market conditions; and (4) accordingly, the petition must be dismissed.[17]

California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Illinois Bell Tel. v. FCC, 883 F.2d 104 (D.C. Cir. 1989); National Ass'n of Reg. Util. Comm'ners v. FCC, 880 F.2d 422 (D.C. Cir. 1989).

[15] *Louisiana PSC*, 476 U.S. at 373, *quoting* Communications Act, § 2(b), 47 U.S.C. § 152(b).

[16] *See, e.g.*, CTIA Comments at 8-10; GTE Reply Comments at iii, 1-3, 18-26; McCaw Comments at 8-11.

[17] *See, e.g.*, RCA Reply at 1-3.

8. The CPUC and its supporters dispute these arguments. While they acknowledge that regulatory parity is a goal of the OBRA, these parties argue that Congress expressly recognized that differential regulatory treatment of CMRS providers is permissible under the Act.[18] Many parties claim as well that differential regulatory treatment of cellular and non-cellular services by a state not only is lawful, but should be required because there is no evidence in this record or elsewhere that non-cellular CMRS providers currently possess market power, thus making regulation of their activities inappropriate.[19]

2. Discussion

9. We have determined in other proceedings that while regulatory parity is a significant policy that can yield important pro-competitive and pro-consumer benefits when appropriately applied, parity for its own sake is not required by any provision of the Act.[20] Indeed, the Act allows us to adopt a flexible regulatory scheme that treats certain CMRS in a streamlined fashion.[21] Congress recognized that market conditions might warrant differential regulatory treatment of CMRS, and it explicitly granted us the authority to forbear from applying certain provisions of the Act.[22] That Congress understood such forbearance might be exercised selectively is not in doubt. As the OBRA Conference Report states in explaining our forbearance authority:[23]

> The purpose of this provision is to recognize that market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services. While this

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[18] *See, e.g.*, CPUC Petition at 96-98 & nn.132, 133; Nextel Reply at 3-5.

[19] *See, e.g.*, E.F. Johnson Comments at 4-5; AMTA Comments at 6; Mtel Comments at 4-5; PageMart Comments at 3-5; NCRA Comments at 9-10.

[20] *See* Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, 9 FCC Rcd 5836, 5858 (1994) (para. 32) (*Craig O. McCaw*), *appeal pending on other grounds sub nom.* BellSouth Corp. v. FCC, D.C.Cir. No. 94-639, filed Sept. 23, 1994; *see generally* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 7988 (1994).

[21] *See CMRS Second Report and Order*, 9 FCC Rcd at 1463.

[22] Section 332(c)(1)(A) provides that the Commission may determine that any provision of Title II may be specified as "inapplicable to [any] service or person" otherwise treated as a common carrier. 47 U.S.C. § 332(c)(1)(A).

[23] H.R. Rep. No. 103-213, 103d Cong., 1st Sess. 491 ("Conference Report"). The Conference Report further provides that "[d]ifferential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section." *Id.*

> provision does not alter the treatment of all commercial mobile services as common carriers, this provision permits the Commission some degree of flexibility to determine which specific regulations should be applied to each carrier.

Nothing in the record of this proceeding, or elsewhere to our knowledge, demonstrates that Congress intended to deny states similar flexibility with regard to the exercise of their CMRS regulatory authority. Thus, we are not persuaded by arguments that the CPUC's request to regulate only cellular services is fatally incongruent with the regulatory parity concepts established in OBRA.

B. Burden of Proof

1. Pleadings of the Parties

10. A second threshold issue addressed by the parties concerns the evidentiary standard to be applied in assessing a state's petition on the merits. Commenters variously characterize the burden of proof as "stiff,"[24] "substantial,"[25] "heavy"[26] or "extremely demanding."[27] Several cite, in support, our statement in the *CMRS Second Report and Order* that a petitioning state must "clear substantial hurdles"[28] in order to overcome the statutory presumption of preemption and emphasize that a state must establish "unique circumstances" within its jurisdiction in order to prevail on the merits.[29]

11. Several commenters argue that the CPUC has erroneously based its case on the duopoly market structure that has, in essence, been eliminated by Congress, rendering its Petition "moot."[30] McCaw and GTE argue that the state must prove the existence of collusive behavior or price fixing in order to prevail.[31] McCaw also argues for a tripartite test, each element of which would be required to be satisfied before a state could continue to regulate intrastate CMRS rates: that there be substantially less competition in the particular

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[24] AirTouch Comments at 24.

[25] CTIA Comments at 5-7.

[26] CCAC Comments at 2-5.

[27] McCaw Comments at 5.

[28] *CMRS Second Report and Order*, 9 FCC Rcd at 1421.

[29] *See, e.g.*, PCIA Comments at 5.

[30] AirTouch Reply at 15.

[31] GTE Supplemental Comments at 18; McCaw Comments at 40-41.

state's CMRS/cellular market than exists at the national level; that Federal remedies be inadequate to redress the problem; and that the benefits of state regulation outweigh its costs.[32]

12. Several commenters filing pleadings in various of the state petition dockets have suggested with respect to the burden of proof issue that our findings in the *CMRS Second Report and Order* on competition in the CMRS market, particularly in the cellular market, place a greater burden on petitioning states attempting to prove failed market conditions. They note, with respect to the latter, our determination in the *CMRS Second Report and Order* that "there is some competition in the cellular marketplace."[33] Others go further and claim that state rate regulation is "presumptively inconsistent with the objectives of section 332(c)," and is effectively barred in light of our decision to forbear from requiring the filing of interstate rates for CMRS.[34]

13. In response, the CPUC and its supporters argue that regulatory parity does not preclude intrastate rate regulation even if the Commission has forborne from tariffing and that Congress could not have thought otherwise or it would not have provided for a state petitioning process in the face of possible Federal forbearance from rate regulation.[35] The CPUC further contends that a cost-benefit analysis of state regulation is not required under the statutory standard and that any suggestion to the contrary "serves only to highlight the carriers' antipathy to any state regulation of their industry."[36] It rejects McCaw's tripartite test as impossible to meet and statutorily indefensible in consequence.[37] In response to allegations that it must prove the existence of collusive behavior among cellular carriers, the CPUC contends that Congress did not adopt an antitrust standard of proof in Section 332.[38]

14. The Cellular Resellers point out that the "statutory language omits any reference to the particular standard which the Commission should apply to any State petition filed under Section 332" and argue that recourse to the legislative history in order to define that standard is thus appropriate. They assert that unpublished transcripts of comments by Senator Richard Bryan in May 25 and June 15, 1993, mark-up sessions on S. 335, and a statement by Senator Byron Dorgan introduced into the record at the June 15 session,

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[32] McCaw Comments at 11-15; McCaw Supplemental Comments at 8.

[33] *CMRS Second Report and Order*, 9 FCC Rcd at 1472.

[34] Comments of McCaw at 6; CCI at 11-12; CTIA at 2, 4, 7-9; AMTA at 4-5.

[35] CPUC Reply at 95-96; Nextel Reply at 4-6.

[36] CPUC Reply at 7, referencing Comments of AirTouch at 61, 71.

[37] CPUC Supplemental Reply at 8.

[38] CPUC Reply at 7.

manifest congressional deference to continued state regulation of CMRS rates.[39] According to the Cellular Resellers, Senator Bryan, in particular, "suggested that 'rather than have an automatic preemption [of State regulation] [Congress should] permit those states that currently regulate to do so and then require[] affirmatively that the FCC would have to determine affirmatively that competition exists....' "[40] Based on these statements, the Cellular Resellers contend that "the Commission can deny a State's petition only if the Commission affirmatively concludes that there is sufficient competition in the marketplace to protect consumers and, hence, no reasonable basis for the State's petition."[41]

2. Discussion

15. In order to prevail on the merits, the CPUC must sustain its statutory burden of demonstrating that "market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[42] A question arises as to what showing is necessary to sustain this burden. Although we addressed this issue in the *CMRS Second Report and Order*, we revisit it in view of the parties' debate in this record. As explained more fully below, we do not agree that our decision to forbear from regulating interstate CMRS under certain provisions of Title II makes it impossible to grant a state's petition. At the same time, we conclude that a state must do more than merely show that market conditions for cellular service[43] have been less than fully competitive in the past. In order to retain regulatory authority, a state must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory.

16. As a threshold matter, we reject the Cellular Resellers' assertion that this Commission, rather than the petitioning state, has what amounts to the burden of proof with respect to questions of market conditions and reasonability of rates. Even if the legislative materials cited by the Cellular Resellers are read as unambiguously expressing an intention

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[39] No copies of these transcripts have been supplied; however, a copy of Senator Dorgan's statement is appended to the Cellular Resellers Reply.

[40] Cellular Resellers Reply at 3, citing Commerce Committee, U.S. Senate (May 25, 1993) (unpublished transcript) at 21.

[41] *Id.* at 5.

[42] 47 U.S.C. § 332(c)(3).

[43] Although the provisions of Section 332(c)(3) of the Act apply to rate or entry regulation in the case of any commercial mobile radio service provider, the CPUC Petition is oriented to the provision of cellular service.

by several senators that the burden not be placed on the states, the plain language of the statute *does* place the burden there. The statute clearly provides that "a State may petition the Commission for authority to regulate ... rates ... and the Commission shall grant such petition *if such State demonstrates* that -- market conditions ... fail to protect subscribers adequately ...."[44] Thus, those portions of the legislative history cited by the Cellular Resellers are without legal significance because they are at variance with the statutory language they purport to explicate. Where statutory language is clear, variant legislative history cannot be used to create ambiguity.

17. What is not clear from the statute, however, are the evidentiary parameters of the phrase "market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." Since the Budget Act does not explicitly construe or elaborate on that phrase, we look to the "design of the statute as a whole and its object and policy" to give that phrase meaning.[45] We begin that task by reference to other Sections of the Communications Act, such as Section 201, which also speak of just and reasonable rates.[46] We have generally described the measure of reasonableness under these Sections in terms of rates that reflect or emulate competitive market operations.[47] The more formal description, however, is whether rates fall within a "zone of reasonableness" that is bounded at one end by the "investor interest in maintaining financial integrity and access to capital markets" and at the other by the "consumer interest in being charged non-exploitative rates."[48] Regardless of how the test is characterized, it is well established that determinations whether rates fall within this zone are not dictated by reference to carriers' costs and earnings,[49] but may take account of non-cost considerations

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[44] 47 U.S.C. § 332(c)(3)(A) (emphasis supplied).

[45] *See* Crandon v. United States, 494 U.S. 152, 157 (1990); McCarthy v. Bronson, 500 U.S. 136, 139 (1991).

[46] *See* 47 U.S.C. § 201; *see also* 47 U.S.C. §§ 623 (b)-(c) (provisions governing reasonableness of cable television rates).

[47] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2873, 2886 (para. 25), 2889-2900 (1989); *see also* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266 & 93-215, FCC 94-286, released Nov. 18, 1994, at paras. 24, 34-37, 64-79.

[48] *See, e.g.*, FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979); AT&T v. FCC, 836 F.2d 1386, 1390 (D.C. Cir. 1988); *see also* FPC v. Hope Natural Gas, 320 U.S. 591, 602 (1944); Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989).

[49] *See* FERC v. Pennzoil Producing, 439 U.S. 508, 517 (1979) (the zone of reasonableness is not defined by a "rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier's] rates on its own costs.") (citation omitted); *see also* Permian Basin Area Rate Cases, 390 U.S. 747, 769, 797-98, 800-05, *reh'g denied*, Bass v. FPC, 392 U.S. 917 (1968) (upholding

such as whether rates further the public interest by tending to increase the supply of the item being produced and sold.[50] These principles define basic components of a state's demonstration under Section 332. Specifically, a state must show that market conditions fail to produce rates that fall within a "zone of reasonableness," which is defined by reference to investor and consumer interests viewed in the context of relevant public policy considerations.

18. We also consider the meaning of the relevant language in the statute in the context of the overarching command of Section 332(c)(3), which is: "no State ... shall have any authority to regulate" CMRS rates.[51] As we concluded in the *CMRS Second Report and Order*, that provision, as well as the title of Section 332(c)(3) ("State Preemption"), express an unambiguous congressional intent to foreclose state regulation in the first instance.[52] Moreover, OBRA reflects a general preference in favor of reliance on market forces rather than regulation. Section 332(c), for example, empowers the Commission to reduce CMRS regulation,[53] and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions.[54]

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ratemaking based upon area-wide average costs).

[50] *See, e.g.*, Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974), in which the Supreme Court upheld a Federal Power Commission incentive plan that permitted an increase in rates in order to encourage increased production. In doing so, the Court emphasized that it was permissible for the agency to consider non-cost factors:

> Mobil's argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here. The Commission explicitly based its additional "non-cost" incentives on the evidence of a need for increased supplies.

Id. at 316. *See also* Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486, 1502-03 (D.C. Cir), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates); Public Service Comm'n of New York v. FERC, 589 F.2d 542, 559 (D.C. Cir. 1978) (stating that agencies have authority to adopt incentive-based regulatory approaches in order to serve the public interest).

[51] 47 U.S.C. § 332(c)(3).

[52] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[53] 47 U.S.C. § 332(c)(1)(A).

[54] 47 U.S.C. § 332(c)(1)(C).

19. Unlike some of the opponents of the CPUC Petition, we do not view the statutory preference for market forces rather than regulation in absolute terms. If Congress had desired to foreclose state and Federal regulation of CMRS entirely, it could have done so easily. It chose instead to delineate the circumstances in which such regulation might be applied. Tellingly, it did so in the context of a broad statutory framework with several other principal components. Under the OBRA: (1) substantial amounts of spectrum reserved for Federal government use are to be identified and transferred to commercial and public safety uses;[55] (2) this and other available spectrum, if allocated to commercial telecommunications uses, are to be licensed "rapidly" through the use of competitive bidding systems to promote the development and deployment of new technologies, products, and services, with the goal of stimulating economic opportunity and competition;[56] and (3) in contemplation of the deployment of spectrum to commercial wireless services, and to promote regulatory parity, Congress also articulated definitional criteria for determining common carrier status consistently so success in the marketplace will not be determined by regulatory strategies but by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs.[57]

20. Viewing all three components together, the statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood that such a market was still evolving,[58] and it provided the resources (*e.g.*, additional spectrum) and administrative authority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, Congress delineated its preference for allowing

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[55] OBRA § 6001, amending the National Telecommunications and Information Administration Organization Act.

[56] *See* OBRA § 6002(a), amending Section 309 of the Communications Act.

[57] *See* 47 U.S.C. § 332(d)(1); *CMRS Second Report and Order*, 9 FCC Rcd at 1420.

[58] The Commission's effort to establish new personal communications services (PCS) was initiated in 1989, four years prior to enactment of OBRA, in response to several petitions for rulemaking. During that period we established a formal proceeding to consider PCS issues and adopted major policy decisions that resulted in an allocation to PCS of far more spectrum than is allocated to cellular service. *See* Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676 (1992); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992); Second Report and Order, 8 FCC Rcd 7700 (1993); Memorandum Opinion and Order, 9 FCC Rcd 4957(1994); Third Memorandum Opinion and Order, 9 FCC Rcd 6908 (1994). We also made recommendations and participated, on behalf of the United States Government, in international allocations decision making fora that recognized and permitted the use of such spectrum for PCS and other emerging technologies on a global scale. *See* Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1992). Congress was well aware of such activities, as witnessed by the fact that the Budget Act commanded us to begin granting licenses for such new services no later than May 1994. *See* OBRA § 6002(d)(2)(B).

this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal.[59] Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment -- rather than burdening entrepreneurial activities -- and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.[60]

21. We emphasize the important impact on our decisionmaking of these fundamental elements of the OBRA statutory framework, which have no counterparts in other sections of the Communications Act. They are devoted exclusively to wireless telecommunications services, and to CMRS in particular. Our analysis of "market conditions" in the context of Section 332(c)(3) necessarily is governed by that framework.

22. Section 332(c)(3) must be interpreted in this context; it is an exception to the general prohibition against state regulation. We conclude that California, or any other state, should not be allowed to continue regulating CMRS overall, or cellular service in particular, merely by demonstrating that the market for cellular service has been less than fully competitive. Such a standard would effectively allow an exception permitting regulation to nullify a general prohibition against it, because it is commonly understood that such conditions have in the past adhered in the cellular marketplace. On numerous occasions since the Commission established the two-carrier cellular market structure in 1982, we have acknowledged that such a structure provided less than optimal competitive opportunities.[61] Other Federal agencies have taken similar positions.[62] One year prior to adoption of the Budget Act, the General Accounting Office (GAO) -- the investigatory arm of Congress -- examined the industry and reported that "[w]hile GAO found no evidence of anticompetitive

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[59] *See CMRS Second Report and Order*, 9 FCC Rcd at 1421; *see also* 47 U.S.C. §§ 309(j)(4)(B), 309(j)(4)(c)(iii); OBRA Conference Report at 483, 492-93.

[60] *Id.*

[61] *See, e.g.*, Cellular Communications Systems, 86 FCC 2d 469, 474 (1981), *modified on reconsideration*, 89 FCC 2d 58, 71-74 (1982), *modified on further reconsideration*, 90 FCC 2d 571 (1982); Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1725 & n.67 (1991) (*Cellular Resale Order*).

[62] *See* Reply Comments of the United States Department of Justice, CC Docket No. 91-34, filed June 19, 1991, at 4-5 ("[T]here is insufficient evidence to warrant the conclusion that the cellular service market is in fact workably competitive. In each service area there is still a duopoly[.]"); Comment of the Staff of the Bureau of Economics of the Federal Trade Commission, CC Docket No. 91-34, filed July 31, 1991, at 7 ("[T]he staff disagrees with the tentative conclusion that cellular service is produced in a competitively structured market."), 10-12.

or collusive behavior in the course of its work, the two-carrier (duopoly) market system that the FCC created may provide only limited competition in cellular telephone markets."[63] It strains credulity to assert that Congress was blind to these conditions in 1993 when it broadly prohibited state regulation of CMRS.[64] Thus, we reject a reading of the statute that allows continued rate regulation merely on a showing of duopoly conditions, because it is not plausible to conclude that Congress adopted a self-defeating statutory scheme.[65]

23. It also is worth noting that this Agency's recognition of imperfect cellular market conditions has been matched by our commitment to rectify those conditions as quickly as possible by strengthening and expanding cellular competition rather than by resorting to heavy-handed regulation.[66] For example, we have attempted to heighten cellular competition at the retail level by prohibiting restrictions on the resale of cellular services, except in narrow circumstances where we determined that restrictions intensify competition between the two licensees in each local market.[67] We also have retooled policies initially tailored to promote competition in the wireline market upon determining that they were unlikely to have that effect in the unique setting of wireless telecommunications.[68] Most especially, we have chosen to address the structural infirmity of the cellular market by vastly expanding the

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[63] United States General Accounting Office, "Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry," GAO/RCED-92-220 (July 1992) (GAO Report).

[64] *Cf.* Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) (Court generally presumes Congress is knowledgeable about existing law pertinent to legislation it enacts); *accord* Miles v. Apex Marine Corporation, 489 U.S. 19 (1990); Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); Minneapolis & St. Louis Railway Co. v. United States, 361 U.S. 173 (1959).

[65] *Cf.* McNary v. Haitian Refugee Center, 498 U.S. 479 (1991) (Court generally presumes Congress legislates with knowledge of basic rules of statutory construction).

[66] *See, e.g.*, GAO Report at 3 (The "FCC is relying on the introduction of advanced personal communications services to bring competition to the cellular telephone marketplace."). The Commission policy of avoiding heavy-handed regulation of the cellular market while it was developing also has been determined reasonable in court. *See* Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1112 (D.C. Cir 1992) (petitions for review of FCC order declining to initiate rate regulation of cellular denied because "the FCC could reasonably conclude, in light of the novelty of the service and the speed of technological change, to wait and see how the market evolved...").

[67] *See Cellular Resale Order*, 7 FCC Rcd at 4006-07. We have recently initiated a review of our resale policies to tailor them to conditions in an emerging wireless telecommunications market that has been expanded to include PCS. *See* Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, 9 FCC Rcd 5408 (1994) (*Notice of Proposed Rulemaking and Notice of Inquiry*), Second Notice of Proposed Rulemaking, FCC 95-149, released Apr. 20, 1995.

[68] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992).

amount of spectrum available for two-way wireless voice communications and other innovative wireless services and technologies.

24. The framework of our CMRS regulatory policy -- moderate regulation, symmetrical regulation of all services as appropriate, and a preference for curing market imperfections by lowering entry barriers in order to encourage competition rather than by regulating existing licensees -- aligns closely with the principal building blocks of OBRA. Indeed, that statute is in a very real sense a validation of our approach.[69] As the legislative history of OBRA makes plain, Congress intended those building blocks to establish a *national* regulatory policy for CMRS,[70] not a policy that is balkanized state-by-state.

25. That intention informs our review of petitions filed by states under Section 332(c)(3). Put simply, Congress intended such petitions to be evaluated in light of a general preference for allowing the policies embodied in OBRA to have an opportunity to work. With regard to the statutory prohibition on state regulation in Section 332(c)(3) in particular, the legislative history leaves no room for doubt on this point by providing that:[71]

> [i]n reviewing [state] petitions . . . the Commission also should be mindful of the Committee's desire to give the policies embodie[d] in section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee.

26. In deference to the states, with whom we have and will continue to share telecommunications jurisdiction under the dual regulatory system of the Communications Act, we have not presumed to establish a rigid blueprint for the demonstration required under Section 332(c)(3). Moreover, unlike many opponents of the petition before us, we do not agree that a state's burden is so great that it is impossible to carry. For example, our decision to forbear from most CMRS regulation is not dispositive of the question whether states may initiate or continue rate regulation of such services. We think it unlikely that

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[69] If Congress had concluded our approach was deficient, or that we should travel in a different policy direction, it is reasonable to conclude that it would have directed us accordingly.

[70] See Conference Report at 480-81, incorporating the findings set forth in the Senate Amendment, including the following:

> [B]ecause commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest.

[71] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261-62.

Congress would have established two separate statutory procedures -- one to govern our forbearance, and another to govern states' petitions[72] -- if it intended our decisions under the former procedure to control automatically the outcomes under both of them. Instead, we conclude that the exemption in Section 332(c)(3) is designed to permit a state to demonstrate that market conditions in that state warrant a departure from national OBRA policies.

27. Such a demonstration begins but does not end with a showing of less than fully competitive market conditions. Almost all markets are imperfectly competitive,[73] and such conditions can produce good results for consumers.[74] In particular, as noted previously, Congress was aware of the duopoly cellular structure when it generally proscribed state regulation of CMRS. If a showing of less than perfect competition in the past could justify granting a state petition, regulation might be imposed in a great many circumstances. Nothing on this record convinces us that Congress intended that result.

28. Instead, we believe that a state must establish the existence of an environment of unjust and unreasonable, or unreasonably discriminatory, rates, given the dynamic and evolving structure in which CMRS is provided. When we implemented the Section 332(c)(3) state petition process in the *CMRS Second Report and Order*, we adopted a rule designed to elicit the information needed to make such a showing. Such information permits us to perform a Structure-Conduct-Performance ("SCP") analysis,[75] which is a standard paradigm of modern industrial organization analysis.[76] This paradigm, as applied to the mobile telecommunications industry, holds that market structure is impacted by basic conditions such as the number of licenses issued by the Commission and the state of

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[72] *See* 47 U.S.C. §§ 332(c)(1) (forbearance) and 332(c)(3) (state petitions).

[73] In general, perfect competition can exist only where goods are homogeneous, and all buyers and sellers have full information and accept price as given (*i.e.*, they do not try to influence price). There are also certain necessary conditions regarding cost of production. *See* D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION 87 (1995). Under perfect competition, price equals marginal cost, which is the incremental cost of producing the last unit of a good. Such conditions are theoretical constructs.

[74] *See, e.g.*, W. Baumol, J. Panzar & R. Willig, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE 15-46 (1982).

[75] Section 20.13(a)(1) requires states to include "demonstrative evidence" establishing failed market conditions. *See* 47 C.F.R. § 20.13(a)(1). Section 20.13(a)(2) provides an extensive, detailed list of the types of information that states are encouraged to supply in order to meet this evidentiary burden. *See* 47 C.F.R. § 20.13(a)(2)(vi).

[76] *See, e.g.*, F. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, 4-7 (3d ed. 1990) ("Scherer and Ross"); D. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION, chs. 1, 9 (2d ed. 1994); J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 1-3 (1988).

technology. Conduct, in turn, depends on the structure of the market, *e.g.*, on the number of competitors, the cost structure, and the degree of integration with other wireless providers. Performance, in turn, depends on the conduct of providers and other industry participants with regard to activities such as pricing, inter-firm coordination, and technical standards. Such an analysis permits an evaluation of the degree of rivalry within a particular industry structure and allows us to determine whether and how consumer interests are being served by such activity.

29. Nothing in our rule governing the state petition process suggests that merely showing the existence of a cellular duopoly structure is enough to support a petition. In the first instance, the rule signals our insistence that a petition must be based on demonstrable evidence of anticompetitive activity, or unjust and unreasonable, or unreasonably discriminatory, rates. For example, in order to determine whether an anticompetitive environment presently exists within a state, we requested that a petitioning state produce "specific allegations of fact," to be supported by a sworn affidavit of an individual with personal knowledge thereof, regarding "anticompetitive or discriminatory practices or behavior by commercial mobile radio service providers."[77] We also requested "[e]vidence, information and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates ... [or a] pattern of such rates, that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces," and we indicated that we would consider such evidence "especially probative."[78]

30. In order to assess present market conditions so as to predict the future effectiveness of market forces within the state, we requested information on the number and type of CMRS providers in the state as well as their respective customers,[79] and "an assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state."[80] We also requested information and complaint statistics revealing customer satisfaction with CMRS providers within the state.[81] In addition to this information, and as a further aid in projecting CMRS growth rates and other trends within the state, we also requested information on "trends" in each commercial radio provider's rates and customer

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[77] 47 C.F.R. § 20.13(a)(2)(vi).

[78] 47 C.F.R. § 20.13(a)(2)(vii).

[79] 47 C.F.R. § 20.13(a)(2)(i) and (ii).

[80] 47 C.F.R. § 20.13(a)(2)(iv).

[81] 47 C.F.R. § 20.13(a)(2)(viii).

base[82] and on "opportunities for new providers to enter into the provision of competing services" as well as "an analysis of any barriers to such entry."[83] In short, although states have the discretion to adduce such evidence in support of continued rate regulation as they see fit,[84] the comprehensive list of anticipated documentation in Section 20.13 gives states guidance concerning the evidence of structure, conduct, and performance that we would find persuasive in evaluating their petitions.

31. The purposes to which such evidence must be put also are straightforward. For example, with regard to industry structure, while a state seeking to regulate two-way mobile voice services may draw attention to the cellular duopoly, it is incumbent on that state to consider factors that have a direct and substantial impact on that structure. In particular, in evaluating a cellular-oriented petition, we will look with disfavor on any petition that fails to consider the immediate and near-term impact of PCS. Given the general statutory purpose of facilitating PCS-type services, it would be difficult to ignore or downplay the importance of fundamental structural changes when considering Section 332(c) petitions.

32. While PCS is not yet available to the public, it is an accepted antitrust principle that a firm may be considered in competitive analysis if it could enter the market in question.[85] Under the caselaw potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors,[86] and there is little doubt that PCS licensees will enter the market for CMRS in

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[82] 47 C.F.R. § 20.13(a)(2)(ii) and (iii).

[83] 47 C.F.R. § 20.13(a)(2)(v).

[84] *CMRS Second Report and Order*, 9 FCC Rcd at 1504.

[85] *See, e.g.*, McCaw Personal Communications, Inc. v. Pacific Telesis Group, 645 F.Supp. 1166, 1174 (N.D. Cal. 1986) ("the existence of low barriers to entry may rebut a prima facie showing of illegality, even where the combined market shares of the merged firms is quite high"), *citing* United States v. Waste Management, Inc., 743 F.2d 976, 982-83 (2d Cir. 1984). *See also* American Bar Association, I ANTITRUST LAW DEVELOPMENTS (THIRD) 307-11 (1992) and cases cited therein.

[86] *See* FTC v. Owens-Illinois, Inc., 681 F.Supp. 27, 37 & n.23 (D.D.C. 1988), *vacated on other grounds*, 850 F.2d 694 (D.C. Cir. 1988) (concerning "the extensive present and future intermaterial competition in the glass and other packaging industries," "[a]n important, but undisputed, assumption of the economic analysis in this case is that the relevant time frame within which to view elasticity is approximately two years. In other words, conversions by purchasers between types of containers must be feasible within this time frame for demand and supply to be considered elastic"); Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 2, 1992)(*Merger Guidelines*), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) at 20,573-10 (Entry Analysis, Timeliness of Entry: "In order to deter or counteract the competitive effects of concern, entrants must quickly achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two

competition with cellular providers within this timeframe. We recently concluded an auction designed to license rapidly two additional competitive providers of wireless two-way voice and data communications in every local market in the country. As shown in the table below, the winning bidders in markets encompassing California have committed to pay substantial sums for the right to operate wireless systems in that state. Having done so, it is reasonable to conclude they will deploy the facilities necessary to become operational as quickly as possible so as to begin recouping their investment.

BROADBAND PCS AUCTION RESULTS

California					
MTA #	Freq. Blk.	State	Market	Winning Bidder	Winning Bid
M004	A	California	San Francisco-Oakland-San Jose	WirelessCo, L.P.	$206,500,000
M004	B	California	San Francisco-Oakland-San Jose	Pacific Telesis Mobile Services	$202,150,000
M002	A	California	Los Angeles-San Diego	Cox Communications, Inc.	$251,918,526[87]
M002	B	California	Los Angeles-San Diego	Pacific Telesis Mobile Services	$493,500,000
M030	A	Oregon	Portland	Western PCS Corporation	$34,155,030
M030	B	Oregon	Portland	WirelessCo, L.P.	$34,139,785

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years from initial planning to significant market impact") (footnote omitted). The *Merger Guidelines* consider firms to be present competitors if, under certain conditions, they could shift production to a new product within only one year. *Id.* at 20,573-4.

[87] This figure represents the amount to be paid by the pioneer's preference licensee, as required by Section 309(j)(13) of the Communications Act. *See* American Personal Communications, Washington-Baltimore MTA #10, Frequency Block A; Cox Cable Communications, Inc., Los-Angeles-San Diego MTA #2, Frequency Block A; Omnipoint Communications, Inc., New York MTA #1, Frequency Block A; For Initial Authorizations in the Broadband Personal Communications Service, Memorandum Opinion and Order, 10 FCC Rcd 1101 (1994).

33. The nature of this impending competitive entry bears emphasis. Unlike the typical "ease of entry" case, where entry by new competitors is hypothetical or may occur only at an industry's margin, PCS activity is undeniably real. It is not something that "may" occur, or that will occur only sporadically. It *is* happening, and it is happening on a nationwide scale. As the recently-completed auction demonstrates, some of this entry is being mounted by large, well-financed entities with long experience and success in the telecommunications business. That field of competitors will be strengthened further upon completion of additional spectrum auctions in the near future. Available evidence indicates that cellular companies, faced with the near-term entry of PCS, have reacted by preparing for impending competition, *i.e.*, by lowering prices and adopting new technologies. For example, there are reports that observable declines in cellular prices are attributable in part to cellular carriers' knowledge that reasonably soon they will face new competition from PCS licensees.[88] The advent of PCS also appears unambiguously to be having an impact on the present marketplace; it is repeatedly cited as a precipitating factor in major mergers and joint ventures in the wireless industry.[89] Thus, the available evidence indicates strongly that such entry is not speculative. Instead, all evidence suggests that it is empirically real and in the very near term will be substantial and pervasive. This warrants our consideration when evaluating a state petition to regulate rates under Section 332(c)(3).

34. Evidence of industry conduct and performance is also relevant. For example, a state might demonstrate specific instances of collusive behavior on the part of licensees. A state also might demonstrate that the statutory purposes of OBRA were not coming to fruition in that state, or were not likely to do so. We would find highly relevant any evidence that demand for CMRS services in general and cellular service in particular is too low to promote market entry by the number of licensees needed to ensure that facilities-

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[88] *See, e.g.*, COMM. DAILY, Apr. 24, 1995, "*Cellular Industry Eyes Further Cuts, Adjustments to Challenge PCS*" (report on independent researcher's projection of cellular service rate cuts "up to 40%" over next two years); COMM. DAILY, Telephony Section, Mar. 9, 1995 (NYNEX cellular company "said it will begin offering PCS-type services in metro N.Y. under Geographic Option Plan trademark, giving customers greater flexibility in setting rates and using service. Monthly charge is $24.99, with additional min. at 29 cents in home county, 99 cents elsewhere"); M. Mills, *Wireless: The Next Generation*, WASH. POST, Feb. 20, 1995, Washington Business Section at 1, 14-15; M. Thyfault, *Bell Companies Get Personal – Bell Atlantic, NYNEX Plan to Merge Their Mobile and Cellular Divisions as PCS Players Continue Consolidation*, INFORMATIONWEEK, Communications Section at 33, July 18, 1994 (Bell Atlantic announces a low-priced, low-range offering on its Annapolis, Philadelphia, and Pittsburgh cellular systems, intended to resemble PCS offerings).

[89] *See, e.g.*, Applications of Bell Atlantic Corp. and NYNEX Corp. for Transfer of Cellular Radio Licenses to Cellco Partnership, Report No. CL-95-17, File Nos. 00762-CL-AL-1-95 *et al.*, filed Oct. 18, 1994, Exhibit 2 ("Description of Transaction and Public Interest Statement") at 12, 14; *Id.*, Attachment D, Affidavit of M. Lowenstein at para. 18; Motorola, Inc., Order, DA 95-890, released Apr. 27, 1995, at para. 17 (Wireless Telecommunications Bureau), *petition for reconsideration pending*; *Craig O. McCaw*, 9 FCC Rcd at 5862-63.

based competition will occur at a level adequate to warrant reliance on market forces, rather than rate regulation, as a means of protecting consumer interests.

35. Moreover, a very strong indication that industry conduct and performance are failing to serve consumer interests adequately would be evidence of a lack of investment on the part of licensees in CMRS facilities, or a failure by licensees to deploy adequately new facilities, technologies, and services. Such a showing might support a conclusion that licensees were restricting the output of a service solely to increase its price, and such activity might warrant an appropriate regulatory response. Of course, a successful showing of this nature requires more than evidence that a licensee is earning economic rents (*i.e.*, pricing above cost). It is readily conceivable that economic rents earned in the cellular industry also might advance important public policies, such as if they were applied in furtherance of the statutory goal of promoting investment in the cellular infrastructure. In that event, the rates underlying such profits would have been paid by those who ultimately benefit from reinvestment in cellular facilities. Specifically, as a cellular carrier adds large numbers of customers, it must expand capacity so that the quality of service to existing and new customers is not degraded. Thus, an analysis of economic performance must place great weight on reinvestment of profits in this high-growth industry, for, without such reinvestment, consumers might receive less value for their money. In short, the significance of economic rents under our Section 332(c)(3) analysis is found not simply in their existence in the first instance but in their subsequent application.

36. Finally, we note that SCP evidence typically may be segregated into two categories: static factors and dynamic factors.[90] For example, prices or rates of return in a given year are static factors. Growth and investment are dynamic factors. In addition, a dynamic analysis views price and other static factors at a given point in time in their relationship to static factors such as price in the future.[91] Thus, a rate of return that looks high today may be fair and reasonable when looked at in terms of its impact on future prices.[92] Furthermore, static factors are, as the name implies, static, or even temporary, whereas the long-term impact of dynamic factors is more important because their effects are cumulative and more permanent. Thus, we believe that evidence concerning dynamic factors is a more persuasive market indicator than evidence concerning static factors. Given the rapidly changing nature of the market in which wireless services are provided and the statutory purposes of OBRA, we conclude that evidence of where a market is going is more relevant than evidence of where it has been.

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[90] *See, e.g.*, J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 209-70 (1988).

[91] *Id.* at 239-70.

[92] In particular, consumers may be better off facing somewhat higher prices today in exchange for high levels of investment by existing competitors.

37. No single factor, standing alone, necessarily would tip the balance for or against a particular state petition. The statute allows the states flexibility to make their showings in the best manner they see fit, and it is conceivable that we might find a showing based primarily on one factor to be persuasive. Those demonstrations that are tied most closely to the statutory scheme are, of course, the most determinative. Our decisions in this proceeding and similar proceedings are based on the totality of the evidence.

IV. CONFIDENTIALITY

38. Completion and consideration of the record in this proceeding was complicated by submission of confidential materials. The treatment of those materials in most respects is resolved by the Bureau's prior confidentiality orders,[93] and need not be recited here, but we summarize the Bureau's determinations and resolve a subsequent dispute arising from an *ex parte* presentation to describe clearly certain elements that have been included, and other elements that have been excluded, from the record.

A. CPUC Supporting Materials

39. The CPUC Petition was based partly upon commercial and financial data for which the CPUC requested confidential treatment under the Commission's Rules. In its confidentiality orders the Bureau granted interested parties access to these data, subject to a protective order, and established a supplemental comment round for submission of analysis of these materials. The CPUC data thus are included in the record; the supplemental comments, while subject to protected disclosure to the extent they specifically refer to confidential CPUC data, raise no confidentiality issues because they do not include any additional data.

B. Data Underlying Hausman Affidavits

40. In the *First Confidentiality Order,* the Bureau granted the CPUC motion to compel production of data underlying affidavits filed by Dr. Jerry Hausman on behalf of CTIA and AirTouch, which were associated with those parties' original oppositions. The Bureau recognized that those data could be submitted with a request for confidential treatment, but required their submission if the analyses Hausman developed from them were

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[93] Petitions of the Public Utilities Commission, State of Hawaii; the State of California and the Public Utilities Commission of the State of California; the Connecticut Department of Public Utility Control; and the New York State Public Service Commission, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-111, order issued by Wireless Telecommunications Bureau on Jan. 25, 1995, (*First Confidentiality Order*); Petitions of the Public Utilities Commission, State of Hawaii; the State of California and the Public Utilities Commission of the State of California; the Connecticut Department of Public Utility Control; and the New York State Public Service Commission, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-208, order issued by Wireless Telecommunications Bureau on Feb. 9, 1995 (*Second Confidentiality Order*).

to be included in the record.[94] Because CTIA failed to submit such data, the Bureau subsequently determined that the Hausman affidavit in support of CTIA's Opposition to California's Petition would not be considered; we affirm that result here and have not considered that affidavit in determining the disposition of the CPUC Petition.[95] In contrast, AirTouch provided the information underlying its Hausman affidavit to counsel for CPUC under a confidentiality agreement, and subsequently submitted that data to this Commission, accompanied by a request for confidential treatment.[96] The two affidavits share some elements, but other data elements are distinctive. The Bureau noted AirTouch's production of underlying Hausman data in the *Second Confidentiality Order,* but did not act on its confidentiality request, as no parties other than California had moved to compel production of the underlying data. Thus, the Hausman affidavit submitted by CTIA is not considered in reaching the result herein, but the Hausman affidavit submitted by AirTouch, and the underlying data, are considered.

C. *Ex Parte* Presentation

41. Several parties submitted *ex parte* communications after the deadline for supplemental comments expired, and confidentiality issues raised with respect to such materials have not previously been considered by the Bureau. One such filing, submitted by AirTouch on March 8, 1995, was supported by a Hausman study dated January 3, 1995, which again relies upon undisclosed data. California moved to strike that study, stating that it had no opportunity to determine the accuracy of the underlying data or its application in Hausman's analysis.[97] California notes that the Hausman study could have been submitted months earlier and further asserts that it is "fundamentally unfair" to allow any party to introduce new materials after the close of a comment cycle restricted by a time frame specified in OBRA for the disposition of such petitions. The CPUC also moved to strike all *ex parte* materials, even those not relying on confidential or undisclosed data, as violative of its due process rights.

42. AirTouch opposes the CPUC motion, stating that the CPUC has not placed in the record data that it relies on from secondary sources. As to *ex parte* filings in general, AirTouch asserts they are allowed for by Commission rules, and states that after Hausman referred to certain of his data in the *ex parte* meeting, our rules required AirTouch to submit them for the record.[98] The CPUC replies that AirTouch does not dispute the unavailability of

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[94] *First Confidentiality Order* at para. 38.

[95] *Second Confidentiality Order* at para. 38.

[96] Letter from D. Gross, AirTouch, to W. Caton, Acting Secretary, FCC, Jan. 27, 1995.

[97] CPUC Motion to Strike AirTouch Ex Parte Filings, filed Mar. 16, 1995.

[98] AirTouch Opposition at 3-4.

the data in the additional Hausman study, and questions why it was not submitted during the formal pleading cycle, as the study is dated January 3, 1995. CPUC adds that the study relies in part on data used, but not disclosed, in the Hausman study originally submitted by CTIA.[99] CPUC finally notes that the secondary sources it relies upon are either public or accessible under protective order.[100]

43. Consistent with the Bureau's previous determinations in the referenced orders, which we affirm, we will strike the January 3, 1995 Hausman study submitted by AirTouch as part of the March 8, 1995 *ex parte* statement to the extent it is based upon confidential data not provided to other parties or subject to their review. As we stated in our confidentiality orders, the same fundamental considerations of access to the record should be applied to the carriers as have been applied to the Petitioner. In this instance, and aside from any issues associated with the pleading cycles or its *ex parte* nature, the supplemental Hausman study relies on materials not made a part of the record or provided to other parties, and to that extent will not be considered.

44. As to that aspect of California's motion that would have us strike any and all *ex parte* communications submitted after the close of formal comments, we note that the Commission's Rules provide for such communications and that no more-restrictive approach with respect to state petition proceedings was incorporated when the procedures for consideration of these petitions were adopted.[101] At this juncture, categorically striking all *ex parte* communications would constitute a significant departure from the norms of Commission due process when the Commission's Rules place parties on notice that such communications are permitted, and in the absence of any circumstances warranting such a departure from usual practice. California has not persuaded us that such a course is justified here.

V. CALIFORNIA PETITION

A. Regulation for Which Continued Authority Is Sought

45. The CPUC has exercised its regulatory authority over cellular service systematically for nearly a decade. The California regulatory regime was revised to essentially its present configuration in 1993.[102] One component of that regime is a series of

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[99] CPUC Reply at 2-3.

[100] *Id.* at 5.

[101] *See* Public Notice, FCC Announces Establishment of Dockets for Materials Filed in Connection with State Petitions for Authority To Regulate Commercial Mobile Radio Service Rates, DA No. 94-1043 (Sept. 22, 1994).

[102] Subsequently, the CPUC commenced proceedings to unbundle wholesale rates.

rate band guidelines, which the CPUC adopted partly in response to carrier contentions that the previous rate filing process had discouraged rate reductions. Under the guidelines approach the carriers establish "ceiling" rates, and they are permitted to raise rates to the ceiling, or lower rates to any level,[103] on one day's notice without CPUC approval, so long as the wholesale-retail rate margin is maintained.[104] Guidelines apply only to tariffed rates; changes to tariffed terms and conditions, including termination penalties, are not permitted to be combined with rate band tariff filings.

46. In 1994 the CPUC further refined its guideline or "band" approach in D.94-04-043, issued April 1994, allowing for provisional tariffs (new service plans with termination dates) and withdrawal of optional plans without CPUC approval if customer notification requirements are met. In that decision the CPUC also allowed automatically renewable contract services to remain, provided certain changes were made to the tariffs affecting termination penalties, term limits, and written customer consent.[105] Wholesale rate increases require 60 days' notice to resellers or master customers. The CPUC requires maintenance of a minimum wholesale-retail price margin.

47. As it refined the existing regulatory mechanisms, the CPUC also initiated an investigation in December 1993, to develop an alternative, dominant/non-dominant regulatory structure, employing trigger mechanisms that automatically would reduce regulation of dominant duopolists. In I.93-12-007 the CPUC proposed additional measures for dominant providers, including the unbundling of radio links to reduce the "market bottleneck" of cellular duopolists, which the CPUC refused to stay in D.94-08-022, an interim decision released on August 3, 1994.

48. The CPUC also has ordered the unbundling of competitive services currently bundled in the cellular carriers' wholesale rates to allow switch-based resellers the option of purchasing competitive services from another provider. Its purpose was to promote cost savings and the provision of value-added service to California consumers.[106]

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[103] The CPUC states that the 1993 decision allowed carriers to "lower rates by any amount on one day's notice without Commission approval," and also states that the 1994 decision "removed the ten percent maximum reduction for temporary tariffs so the rates could be dropped to any level on one day's notice." Petition at 17-18.

[104] *Id.*

[105] *Id.* at 18-19.

[106] *Id.* at iii.

B. Summary of CPUC Request

49. California requests that it be authorized to retain its existing regulatory authority over the rates of cellular service in California, including the unbundled rate elements of cellular service, "for 18 months, commencing September 1, 1994, after which time the CPUC expects that market forces, triggered by the widespread deployment of alternative competitive providers in California, will ensure just and reasonable rates for cellular service to California consumers."[107] California asserts that, in the interim, and in the face of the continued potential for anticompetitive behavior, "[o]ur solution as adopted in our August 3 order in I.93-12-007, is to adopt a program of wholesale rate unbundling based upon prices capped at existing rate levels."[108] California contends that, without continued authority to regulate rates, it will be unable to forestall cellular carriers' attempts to defeat increased competition from resellers by increasing their wholesale rates so as to nullify the advantages to resellers effected by the unbundling of wholesale rates.[109]

C. "Grandfathering" Rate Regulation by CPUC

1. Background

50. The pleadings raise a question concerning the status, under Section 332(c)(3)(B), of any regulations concerning CMRS rates enacted by a petitioning state after June 1, 1993. Section 332(c)(3)(B) provides as follows:[110]

> If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after the date of enactment of the Omnibus Budget Reconciliation Act of 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition.

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[107] *Id.* at 81. California does not seek to regulate non-cellular CMRS.

[108] *Id.*

[109] *Id.* at iii. *See also* CPUC Supplemental Reply at 3. The Cellular Resellers endorse the CPUC's arguments, agreeing that they are the only present source of competition in the California cellular industry, that their market shares have dropped "precipitously," and that, absent continuing regulatory protection, they will be "squeezed out" of the cellular market. Cellular Resellers Reply at 5-7.

[110] 47 U.S.C. § 332 (c)(3)(B).

51. In August 1994, the CPUC ordered the unbundling of access charges from cellular wholesale rates, giving resellers the option of maintaining their own switches and obtaining interconnection directly from the local exchange carrier.[111] The CPUC Order also gave resellers a block of telephone numbers directly from the number administrator.[112] The pleadings raise the question whether Section 332(c)(3)(B) barred the CPUC from enacting these particular regulatory provisions, or any others, after June 1, 1993.

2. Pleadings of the Parties

52. Several opponents of the CPUC Petition, including AirTouch, CCAC, L.A. Cellular, McCaw, and US West, point out that none of the regulations in the August 3, 1994 Order of the CPUC was in effect on June 1, 1993, or was a part of the California regulatory framework as of that date.[113] They argue that the August 3, 1994 CPUC Order is an attempt to "grandfather" these regulations along with those CPUC regulations that were in effect as of June 1, 1993, for the duration of the state petition proceeding. In support, they focus on the phrase "existing regulation" in the second sentence of Section 332(c)(3)(B), arguing that the grandfathering provision is regulation-specific and that it refers only to "any [specific] regulation" that was "in effect on June 1, 1993."[114] The various opponents contend that, as a result, the adoption of new regulations by the CPUC after June 1, 1993, was contrary to the Congressional mandate of Section 332(c)(3)(B)[115] and was preempted by the statute.[116] Similarly, one commenter also contends that the CPUC is barred from issuing any rules as a result of its two investigative proceedings commenced after June 1, 1993, unless and until its Petition is granted.[117]

53. In its Reply, the CPUC asserts that it is a state's authority to continue to regulate CMRS rates that is preserved from preemption during the pendency of its petition,

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[111] CPUC Interim Opinion, Aug. 3, 1994 (August 3, 1994 CPUC Order).

[112] *Id.*

[113] *See* Comments of AirTouch at 18; CCAC at 93-100; L.A. Cellular Reply at 53-54 (pointing out that rate-based regulation and reseller switching requirements were not in effect as of June 1, 1993). *See also* Comments of McCaw at 26-28 & n.64; US West at 17-18.

[114] *See, e.g.*, McCaw Comments at 27 & n.64.

[115] *See, e.g.*, Comments of AirTouch at ii-iii; McCaw Comments at 24-28.

[116] *See, e.g.*, US West Comments at 18.

[117] *See* Comments of US West at 18 & n.13 (referring to CPUC investigations, *e.g.*, I.93-12-007, initiated in December 1993, seeking to modify the existing California regulatory framework based on whether a carrier is dominant or non-dominant).

not the precise set of regulations in place as of June 1, 1993.[118] In support, the CPUC focuses on repeated references to a state's "authority over rates" in Sections 332(c)(3)(A) and 332(c)(3)(B) and explanations in the underlying legislative history concerning Congress's intention to adopt "a 'grandfathering' provision that permits states that regulate the rates for any commercial mobile services as of June 1, 1993 to continue to exercise such authority until the Commission issues a final order in response to a petition...."[119] The CPUC emphasizes that Section 332(c)(3)(A) is articulated solely in terms of "authority," that Section 332(c)(3)(B) reiterates the provision in subparagraph (A) that any grant of a petition by this Commission "shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly and unreasonably discriminatory," and that Section 332(c)(3)(B) expressly references Section 332(c)(3)(A) and should be read in the context of that subparagraph. The CPUC concludes that, when the phrase in Section 332(c)(3)(B) referring to "existing regulation" is read in the entire context of Section 332(c)(3), it is apparent that Congress intended to "grandfather" a state's authority to regulate rates, rather than those specific regulations in place as of June 1, 1993, and that use of the term "regulation" in Section 332(c)(3)(B) was "simply a shorthand reference to regulatory authority."[120]

54. California also invokes the Congressional policy underlying Section 332(c)(3) as an aid to statutory interpretation and asserts that Section 332(c)(3) and the underlying legislative history demonstrate that Congress viewed the role of the states as significant in furthering the transition to competition within intrastate markets for CMRS services. It argues that, given this policy and the rapid and dynamic technological changes beginning to emerge in the wireless industry, it makes no sense to believe that Congress intended to lock a state in to a particular set of regulations that could be as many as two years old and might no longer serve the public interest, rather than giving it the flexibility during this transition to adapt its regulations to continuing technological and market changes.[121]

3. Discussion

55. We do not believe that the language of Section 332(c)(3) lends itself to the interpretation advocated by the cellular carriers, particularly in light of the statutory objectives underlying that Section. The phrase "such authority over rates" is clearly generic, rather than regulation-specific. Section 332(c)(3)(A) preempts states from regulating CMRS

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[118] CPUC Reply at 87-95. *See also* Cellular Resellers Reply at 45-50.

[119] CPUC Reply at 90-93, *citing* Conference Report at 493.

[120] *Id.* at 92 n.127.

[121] *Id.* at 93-94.

rates by providing that "no state ... shall have any authority to regulate ... the rates charged by any commercial mobile service ...."[122] The exception to this preemption, set forth in both subparagraphs (A) and (B), is also articulated in jurisdictional terms: "If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates ... as the Commission deems necessary ...."[123]

56. Subparagraph (B) also addresses the question of interim regulation for petitioning states that had "in effect, on June 1, 1993, any regulation concerning ... rates" and provides, with respect to such states, that "the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action ... on such petition."[124] We conclude that the use of the term "regulation" in these provisions of subparagraph (B), rather than the phrase "authority to regulate rates," is without significance because subparagraph (B) is framed as an exception to a jurisdictional rather than a regulation-specific preemption. Thus, we agree with the CPUC that use of the term "regulation" in subparagraph (B) is merely a "shorthand" or alternative reference to a state's rate regulation authority.

57. Our conclusion is supported by the legislative history of the grandfathering provision. The Conference Report notes that the Senate Amendment "grandfathering provision" was added in part in order to provide "regulatory certainty to potential bidders for licenses to provide commercial mobile services."[125] What is meant by the concept "regulatory certainty" in this context is explained in the next sentence: "The Conference Agreement clarifies that State authority to regulate is 'grandfathered' *only to the extent that it regulates commercial mobile services 'offered in such State on such date*."'[126] The inference from the emphasized language is clear: if the rates for a certain class of CMRS, such as paging, are not regulated as of June 1, 1993, a state cannot assert such jurisdiction after that date or during the pendency of its petition. What is grandfathered is the state's assertion of jurisdiction, not the particular regulations promulgated as an exercise of this jurisdiction. This conclusion is buttressed by the Conference Report's exclusive use of the phrase "authority to regulate" in explaining the provisions of subparagraph (B), in general, and the grandfathering provision in particular. The latter is further elucidated by the following statement in the Conference Report: "State authority to regulate is only 'grandfathered' if the state files a petition seeking such authority ...; if the state fails to file [such] a petition ... the

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[122] 47 U.S.C. § 332(c)(3)(A).

[123] *Id.*

[124] 47 U.S.C. § 332(c)(3)(B).

[125] Conference Report at 493.

[126] *Id.* (emphasis supplied).

state authority is preempted under subsection (c)(3)(A).''[127] That which is preempted is jurisdictional in nature; likewise, that which is grandfathered also is jurisdictional in nature.

58. Finally, and of equal importance, we base our interpretation concerning the scope of the grandfathering provision on the policies underlying Section 332(c)(3). We agree with the CPUC that, given the Congressional objectives of relieving presumptively unnecessary intrastate rate regulation of CMRS and promoting the operation of market forces to effect just and reasonable rates, Congress could not have intended to calcify regulations adopted by California as many as two years prior to final action by this Commission on the CPUC's petition to continue such rate regulation. Such a denial of flexibility would be particularly imprudent given the rapid technological innovation characteristic of the present CMRS market and anticipated changes in market structure and performance resulting from the advent of PCS and wide area Specialized Mobile Radio (SMR) services. At its extreme, such an interpretation would prohibit a state from alleviating regulatory burdens that events subsequent to their enactment had rendered unnecessary. Such Congressional deference to outmoded regulation is nowhere evident in the statute.

59. On the foregoing bases, we conclude that, pursuant to Section 332(c)(3)(B), the regulations promulgated under state authority after June 1, 1993, remain in effect, if the state has preserved that authority by filing a petition to continue to exercise authority over CMRS rates. This would include regulations adopted by the CPUC during the pendency of its Petition, pursuant to investigations initiated after June 1, 1993.

D. Elements of the CPUC Case[128]

1. Market Structure

60. The CPUC argues that the FCC-created duopoly market structure for cellular services has created ''near absolute'' barriers to entry and a consequent lack of potential competitors' access to ''bottleneck facilities,''[129] citing, in support, DOJ's Memorandum in Response to the Bell Companies' Motions for Generic Wireless Waivers, concluding that ''cellular duopolists plainly have market power in cellular service'' and that

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[127] *Id.* at 493-94.

[128] Our discussion of the pleadings uses as an organizational methodology the components of the Structure-Conduct-Performance paradigm, with the result that issues that arguably could be categorized under more than one heading have necessarily been assigned to that which best facilitates our discussion as a whole.

[129] The CPUC defines ''bottleneck facilities'' in this context as the cellular radio spectrum and switching facilities. *See* CPUC Petition at 25-27; *see also* Comments of CATA at 7-8.

"cellular exchange service markets are not competitive today."[130] California argues that this market structure, together with interlocking ownership interests within and among California cellular markets,[131] have inhibited the emergence of competition in California's cellular industry.[132] Adopting the *Merger Guidelines* in order to facilitate its analysis of this duopolist market,[133] the CPUC defines the relevant market in terms of the substitutability of other mobile communications services[134] and identifies cellular service as the relevant market because it concludes that no viable alternatives to cellular service presently exist.[135] California points out that meaningful deployment of wide area SMR by Nextel will not occur until 1995 or later[136] and that PCS, which also is a likely substitute for cellular service, will have to develop a geographically dispersed and operational network before being able to offer service at competitive prices.[137] The CPUC estimates that, until these comparable services can provide adequate competition, the only viable source of competition will continue to be the cellular resellers.[138]

61. The CPUC has offered various data and accompanying analyses in support of its contention that the cellular carriers have market power and that the California cellular market is insufficiently competitive, in consequence. It argues that the market share between the duopolist cellular carriers in the same markets has remained substantially the same over a five-year period and that it has steadily increased at the expense of the cellular resellers.[139]

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[130] *See* CPUC Petition at 27, citing Memorandum in Response to the Bell Companies' Motions for Generic Wireless Waivers with the United States District Court for the District of Columbia Circuit, Civil Action No. 82-0192, filed July 25, 1994, at 13-14; *see also* Comments of Cellular Resellers at 2-3.

[131] California points out that a total of 16 MSAs, including the major markets of Los Angeles and San Francisco, and four RSAs are affected by interlocking directorates and emphasizes that we voiced concern about this situation in the *CMRS Second Report and Order*, 9 FCC Rcd at 1468. CPUC Petition at 27-28 & Appendix C.

[132] CPUC Petition at 68-70.

[133] *Id.* at 21-23; CPUC Supplemental Reply at 10. For arguments critical of using the *Merger Guidelines* in this context, see McCaw Comments at 36.

[134] CPUC Petition at 23-25.

[135] *Id.* at 21-25, 65-70.

[136] *Id.* at 65; CPUC Reply at 15-17.

[137] CPUC Petition at 75-78; CPUC Supplemental Reply at 2.

[138] CPUC Supplemental Reply at 11-14.

[139] CPUC Petition at 29-34.

California also has employed the Herfindahl-Hirschman Index (HHI) to calculate a market concentration of 3750 for the California cellular industry, argues that this result provides evidence that the cellular market is highly concentrated "even if Nextel were a viable competitor today," and contends that this high degree of market concentration is further evidence of market power by the duopolist cellular carriers.[140]

62. The cellular carriers take issue with several points in the CPUC's structural analysis of the cellular market in California. They argue that mere proof that the cellular industry is a duopoly is insufficient to sustain the state's burden of proving that market conditions are inadequate to protect subscribers, since Congress was well aware of the duopolist structure of the cellular market when it nevertheless preempted states from rate as well as entry regulation of CMRS.[141] They also contend that the cellular carriers do not exercise bottleneck control.[142] Several assert that relative wholesale market shares between duopolist carriers in a particular geographic market did change during the period in question.[143] However, they also maintain that market share is not necessarily reflective of insufficient competition and may, in some instances, be attributable to differences in the size of the carriers' respective coverage areas.[144] With respect to resellers and market share, they assert that the resellers' decline is attributable to a proportionately lesser increase in customers than that for cellular carriers,[145] that the CPUC's data ignore the market share of retail chains,[146] that there is no proven correlation between reseller market share and

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[140] *Id.* at 31-34. *See also* CPUC Supplemental Reply at 15-17. The Herfindahl-Hirschman Index (HHI) is determined by summing the squares of the market share of each competitor in the market. The higher the H value, the less competitive the industry. An industry is highly concentrated if its HHI exceeds 1800.

[141] *See, e.g.*, Supplemental Comments of AirTouch at 4. GTE argues that the state must establish the existence of collusive behavior in order to prevail. GTE Supplemental Comments at 12-13. The CPUC contends that the statute does not require an antitrust analysis. CPUC Supplemental Reply at 7, 22-23.

[142] *See, e.g.*, Comments of AirTouch at 30-31; Affidavit of B. Owen for McCaw at 3, citing finding to this effect in *CMRS Second Report and Order*. *Contra*, NCRA Comments at 1-2.

[143] *See, e.g.*, Supplemental Comments of McCaw at 4; GTE at 8.

[144] GTE Supplemental Comments at 7-8.

[145] McCaw Supplemental Comments at 6.

[146] Supplemental Comments of AirTouch at 12. Hausman contends that large retail chains are the most efficient distribution method for cellular equipment and service.

competition,[147] and that OBRA protects customers, not competitor inefficiencies.[148] McCaw suggests that any future unfair practices against resellers by cellular carriers can be remedied through this Commission's complaint authority and contends, further, that this Commission has acquired jurisdiction over intrastate CMRS rates, in the absence of a successful state petition.[149] Several cellular carriers challenge the CPUC's market concentration data and analysis, arguing that the CPUC has erroneously treated both carriers in a market as a single entity when calculating the HHI,[150] that California's is the least concentrated cellular market in the Nation and that the effect of competitors' relatively small market shares nevertheless may be significant because prices are determined by reference to those customers initiating service; *i.e.*, competition in the cellular industry "takes place at the margin."[151]

2. Conduct

63. The CPUC contends that the activities of cellular carriers in California have exacerbated the inherently noncompetitive nature of cellular's duopoly market structure. It asserts that several practices employed by the cellular carriers have anticompetitive effects, including the use of "lock-down" contracts to obligate customers for longer commitments[152] and parallel pricing, which the CPUC alleges is facilitated by the existence of interlocking ownership interests within and among the various geographic markets.[153] The CPUC also contends that confidential data obtained by the California Attorney General as part of a study of the cellular industry buttress the CPUC's arguments on the issue of anticompetitive behavior by cellular carriers.[154] Cellular Agents Trade Association (CATA) contends that the cellular carriers have shifted distribution modes from independent agents to multi-outlet mass

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[147] Supplemental Comments of AirTouch at 12; McCaw at 5; Supplemental Reply of AirTouch at 8; McCaw at 5.

[148] Supplemental Reply of AirTouch at 10.

[149] McCaw Comments at 6-7 & Supplemental Reply at 5-6.

[150] *See, e.g.*, Comments of CCAC at 17-28.

[151] *See, e.g.*, Supplemental Comments of AirTouch at 10-11; McCaw at 7. In his affidavit filed with AirTouch's Comments, Hausman cites the example of the airline industry in support of his contention that market share data are largely irrelevant where the market is characterized by new entrants. Hausman at 23-24.

[152] CPUC Petition at 45.

[153] *Id.* at 40-45; CPUC Reply at 72.

[154] CPUC Petition at 74; CPUC Supplemental Reply at 33-37. These confidential data have been considered in rendering a determination in this proceeding but are nowhere discussed with specificity in this Order.

merchandisers such as Circuit City and Sears, that preferential treatment accorded the latter has driven many independent agents out of business, and that this constitutes a strategy by the cellular carriers to monopolize the market for cellular equipment.[155]

a. "Lock-Down" Contracts

64. The record compiled by the CPUC demonstrates that the CPUC has acted to constrain carriers' marketing practices affecting cellular service contracts, in particular the "automatic renewal" provision. The CPUC indicates that it will permit renewable contract services to remain, provided that the contract term is limited to three years, that any termination penalties are prorated, and that in no case do termination penalties apply after the first year. In addition the CPUC requires customer signatures on contracts with penalties, and customer notice prior to contract renewal.[156]

b. Parallel Pricing

65. The CPUC contends that a review of the prices charged by cellular carriers in the major California markets reveals a pattern of parallel pricing which, when combined with other factors, is consistent with a noncompetitive market.[157] It contends that tariffs for the two facilities-based carriers in the Los Angeles market show nearly identical discount plans which were filed within two days of each other, as well as discount plans with identical features. The CPUC rejects the carriers' argument that this synchronicity of pricing is attributable to the anticompetitive effects of tariffing and resultant notice of competitors' price changes and ascribes the phenomenon, instead, to the fact that the "two carriers are tacitly aware of each other's pricing strategies."[158]

66. Several commenters observe that a more competitive market structure than the cellular duopoly might manifest "parallel pricing" between different firms because production, marketing, and consumer preference considerations are accurately and consistently perceived by multiple firms. They also contend that pricing similarities are facilitated by regulation because tariffing requirements provide advanced notice of impending price changes by competitors. CCAC disagrees that discount plans are similar in the Los Angeles market.[159]

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[155] CATA Comments at 5-7.

[156] *See* CPUC Petition at 18-19.

[157] CPUC Reply at 72.

[158] *Id.*

[159] CCAC Comments at 20, Appendix B.

3. Indicia of Performance

67. The CPUC contends that the duopolist market power of the cellular carriers in California is reflected in their rates of return and the prices charged for cellular service, which it alleges have been maintained at an artificially high level by the carriers' deliberate underutilization of cell sites. It also points to other indicia of performance such as the lesser prices paid for PCS, as opposed to cellular, spectrum, and the Q Ratios derived from the market values for cellular firms.

a. Q Ratios and Spectrum Value

68. A firm's Q Ratio is the ratio between its market price and the replacement cost of its assets. California states that a recent study of 20 U.S. industries shows a Q ratio of 3.32 in the 1961-1985 period. It alleges that, in contrast, cellular firm Q ratios ranged from 6.68 for small firms to 13.52 for large firms, nationwide,[160] and that the Q ratios for cellular firms in Los Angeles and San Francisco were among the highest in the Nation.[161] The CPUC argues that this disparity between market price and asset value is attributable to the supracompetitive rates charged by cellular carriers with market power sufficient to control prices in the California market. The CPUC derives additional support for this argument from the market prices for cellular, as opposed to PCS, spectrum. It contends that the present per "POP"[162] value for PCS spectrum, including major urban areas, is $14, whereas that for cellular spectrum is $200 per POP. It ascribes this disparity in values to cellular carriers' ability to extract duopoly rents.[163]

69. The Cellular Resellers are in accord with the CPUC's Q ratio analysis.[164] However, several cellular carriers challenge the relevance of Q ratios to market power and

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[160] The Q Ratio analysis was developed by Thomas W. Hazlett. *See* T. Hazlett, Market Power in the Cellular Telephone Duopoly, A Report Prepared for Time Warner Telecommunications, August 1993. According to the analysis, market price is based on the discounted stream of expected profits, and an excessive market price when compared to asset replacement cost reflects investor expectations of profits above the competitive level. In a subsequent paper, Hazlett recalculated the Q Ratio for cellular carriers as 5.9, based upon adjustments advocated by critics of his earlier estimates. *See* Hazlett, "Errors in the Haring & Jackson Analysis of Cellular Rates," attached to CPUC Reply as Appendix M.

[161] Petition at 62-63; CPUC Supplemental Reply at 18.

[162] The term "POP" is a term of art referencing each person of the resident population in a given service area.

[163] *See, e.g.*, CPUC Supplemental Reply at 23.

[164] Comments of Cellular Resellers at 26.

claim that a high Q ratio is as consistent with spectrum scarcity as with extraction of monopoly rents.[165] Others allege that factors such as growth exaggerate a firm's Q ratio.[166] With respect to spectrum value, several carriers contend that high prices, both for cellular licenses and cellular service, reflect the scarcity of spectrum, rather than a noncompetitive market with only two carriers.[167]

b. Cellular Service Rates

70. California contends that, although rates have been somewhat suppressed by state regulation, cellular rates for the major California cellular carriers remain among the highest in the Nation.[168] It states that its review of basic and discounted rate plans disclosed "[s]tagnant or slowly declining cellular rates" in a context of lower costs and declining capital investment per subscriber.[169] The CPUC states that its study of rates for the 1989-1993 period determined that the average, nominal rate (before inflation adjustment) for the basic plan remained unchanged in three markets, including the State's largest, increased in one market, and decreased by 5 percent or less in the other four markets studied. It also found that the basic retail rates were "nearly identical" in Los Angeles and Santa Barbara, and varied by less than 7 percent in all other markets except Sacramento.[170] When inflation is considered, California states, rates for basic plans in all markets have declined by an average of 14.9 percent, compared to the nominal reduction of 0.8 percent,[171] while operating expenses per subscriber have fallen by 47 percent in real terms and capital investment per subscriber has also declined substantially.[172]

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[165] *See, e.g.*, Comments of AirTouch at 60-61; GTE at 27 n.16, n.17.

[166] *See, e.g.*, Comments of McCaw, Owen Affidavit at 31-32.

[167] *See, e.g.*, GTE Comments, Appendix A at 8; AirTouch Comments at 59; CPUC Reply at 74-77.

[168] CPUC Petition at 45-46, citing, in support, U.S. General Accounting Office, "Telecommunications Cellular Service Competition," Testimony before the Senate Committee on Energy and Public Utilities, Legislature of the State of California, Jan. 12, 1993, at 7.

[169] CPUC Petition at 40-42.

[170] *Id.* at 34-35.

[171] Neither California's Petition nor Appendix I specifies the inflation adjustor applied to cellular carriers' rates.

[172] California cites a CTIA exhibit in its state proceeding that showed capital investment per cellular subscriber had declined from $1,816 to $978 between June 1988 and June 1993. CPUC Petition at 35 n.15.

71. California's 1989-1993 study examined pricing data from all plans offered by facilities-based carriers in the top five California Metropolitan Service Areas (MSAs) and two small Rural Service Areas (RSAs). California recognizes that carriers offer a variety of retail plans with different combinations of charges, terms and conditions, and states that the prevalence of discount plans makes comparing cellular prices over time difficult. The CPUC also states that a direct comparison of rates between discount plans and basic plans is "not valid, because discount plans have a number of restrictions and conditions which reduce their value." These include, according to the CPUC, the customer's loss of contractual flexibility, exposure to termination charges, and the possible denial of immediate access to new technologies as they become available.[173] California recognizes that, while most customers subscribed to the basic or "unrestricted" plan in the first years of cellular service, by 1993 only 37 percent of subscribers in major markets still were on that plan.[174]

72. California states that nominal rates for basic plans for both carriers in three of the markets studied have not changed in five years and asserts that national price trends for cellular service do not track declining costs.[175] The CPUC notes that, although it established rate guideline procedures in April 1993 that permit carriers who lower rates to restore them to previous levels on one day's notice, no single significant rate reduction has lasted more than three months in any market.[176] The CPUC invokes an analysis proffered by a party in its ongoing investigation, Cellular Services, Inc., purporting to show that most price reductions asserted by carriers either failed to reduce rates or expired.[177] The CPUC concedes that discount plans offer "modest rate relief to some customers," but insists that these reductions be considered "in terms of reduced flexibility, risk of termination fees and foregone access to emerging technologies."[178] To consider the effect of discount plans on rates, California contends, its study would have to be based on a random sample of customer bills and consider as well the costs of any restrictions or benefits outside the direct rates, *e.g.*, term contracts and discounts on customer premises equipment (CPE).

73. The cellular carriers' initial comments on pricing were made without the benefit of access to the confidential pricing data submitted by the CPUC with its Petition

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[173] *Id.* at 36-37.

[174] *Id.* at 40-41.

[175] *Id.* at 39, *citing* May 5, 1994, Wall Street Journal, "Cellular Phone Rates Spark Static From Users."

[176] CPUC Petition at 39 n.21.

[177] CPI's analysis asserts that by March 1994, only two of fifteen filings made in the year following adoption of the 1993 rate band guidelines remained in effect, and that of 34 price-reducing tariffs referenced by L.A. Cellular, only five actually reduced rates. *Id.* at 40.

[178] *Id.* at 43.

and, in consequence, are of correspondingly lesser importance than their supplemental comments and replies filed after their examination of these materials under the terms of the Protective Order.[179]

74. The carriers raise several issues in their supplemental comments and replies concerning the pricing arguments proffered by the CPUC. Several commenters emphasize, in the first instance, the CPUC's acknowledgment that cellular rates have declined over the past several years.[180] AirTouch asserts that, from 1990 to 1993, its prices in Los Angeles decreased almost five times more than costs decreased -- by a nominal 12.0 percent (a real 20 percent), while expenses dropped only 2.5 percent. It concedes that its analysis is based on rates for 200 minutes of use (MOU) but alleges that customers with lower usages also benefitted; *e.g.*, 10 MOU nominal prices decreased by 8.0 percent (a real 16.3 percent).[181] L.A. Cellular states that the rate data contained in Appendices I and J to the CPUC Petition are inaccurate, citing, in support, discrepancies between reported best rates for its own subscribers and those actually tariffed.[182]

75. Several carriers allege that, to the extent that high prices have existed, they are attributable, in some measure, to regulatory practices employed by the CPUC. Specifically, AirTouch asserts that its own usage prices did not decline between 1986 and 1990 because during that period rate reductions required 40 days' notice and the restoration of prices could entail a "complete rate application" hearing lasting as long as two years.[183] L.A. Cellular contends that price initiatives have taken the form of promotions because of "regulatory inhibitions" that persist. It states that "new rate plans" still require significant advance notice and that CPUC procedures require characterization of rate reductions as "promotional" if they are to be implemented with minimal delay.[184] It contends that complaints that these plans are not permanent in nature and that a basic rate reduction is

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[179] *See* discussion of Confidentiality in Section IV, *supra*.

[180] *See, e.g.*, CCAC Supplemental Reply Comments at 6-7.

[181] AirTouch Supplemental Comments at 8; Hausman Affidavit at para. 3.

[182] L.A. Cellular Supplemental Comments at 5.

[183] Hausman Affidavit at para. 4 n.2. Hausman contends that regulation by the CPUC is costing California cellular subscribers $240 million per year in higher cellular prices. L.A. Cellular also cites these regulatory requirements as impediments to cellular carriers' lowering rates. L.A. Cellular Supplemental Reply Comments at 7-8.

[184] L.A. Cellular Supplemental Comments at 12. See also its Supplemental Reply Comments alleging that alternative, discount plans have proliferated as a direct consequence of partial regulatory reforms introduced by the CPUC beginning in 1990, such as temporary tariffs and rate decreases on shorter notice. L.A. Cellular Supplemental Reply at 7-8.

preferable also ignore market mechanisms and the need to appeal to specific customer groups.

76. Other commenters take issue with the CPUC's use of rates for basic plans, rather than discount plans, to support its contentions with respect to the pricing of cellular service.[185] For example, based on its review of the confidential data concerning the percent of subscribers in the Los Angeles, San Diego and San Francisco markets that have remained on basic plans, AirTouch states that the vast majority of subscribers in the major California MSAs use discount plans providing greater savings, that the migration to discount plans accelerated in 1994 when AirTouch filed 16 new service plans during pendency of the CPUC Petition, and that the CPUC thus improperly relied on basic rate plans to assert that cellular prices are "stagnant or slowly declining."[186]

77. In addition, AirTouch states that the CPUC's comparison of prices to income per subscriber is flawed. It contends that, while plant investment per subscriber and operating expenses remained roughly constant from 1990 to 1993 (varying under 7 percent), income per subscriber decreased 47 percent. AirTouch attributes this decline to discount plans offering savings to subscribers that the CPUC has chosen to ignore and to lower usage by more recent subscribers.[187] It observes that, unlike AT&T's behavior when tariffing long distance service options, cellular carriers have not raised the price of basic plans when offering greater discount plans.[188]

78. In response to these comments, the CPUC states in its Supplemental Reply that price declines for cellular service do not determine whether current price levels are just and reasonable or whether the cellular industry is competitive and that a customer's choice between rate plans, none of which contains reasonable prices, terms and conditions, says nothing about the reasonableness of the discount plan selected.[189] The CPUC notes that some carriers concede that a comparison limited to discount rates, without consideration of other terms, may overstate the extent of savings, and contends that high growth rates or customer

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[185] *See, e.g.*, Charles River Associates for CCAC at 13; Supplemental Comments of AirTouch at 6-7; CCAC at 6-9; Supplemental Reply Comments of CCAC at 2-4; L.A. Cellular at 3-4.

[186] AirTouch Supplemental Comments at 6-7. *See* also CCAC Supplemental Comments at 6-7.

[187] AirTouch Supplemental Comments at 9.

[188] Hausman Affidavit at para. 6 n.3. Hausman also asserts that the declining profit per subscriber demonstrates the effect of competition. *Id.* at 3-4. He states that "[t]he decreased margins demonstrate an effective increase in competition of approximately 50% during this time period using the best known model of the markup of price over marginal cost with imperfect competition and large fixed costs found in the economic literature." *Id.* at 4 n.6.

[189] CPUC Supplemental Reply at 26-27.

migration between plans does not indicate the competitiveness of services or the reasonableness of prices.[190]

79. California asserts that the decline in operating income per customer noted by AirTouch is irrelevant to cellular firms' financial performance but does demonstrate that cellular carriers have found that serving comparatively few customers is advantageous. The CPUC adds that AirTouch's explanation that high cellular rates in New York and Los Angeles are attributable to capacity constraints contradicts its claim that regulation had caused higher prices in those markets.[191] The CPUC states that the cost of providing cellular service is declining faster than prices and that AirTouch has confused expenses with costs, using operating expenses per customer to show the competitiveness of cellular prices when the relation of cost to price is the proper focus.[192] The CPUC concedes that its annual reports do not adequately allocate between wholesale and retail operations and that a more accurate view of relevant expenses for providing cellular services would come from wholesale operations, but asserts the industry's prices are so unrelated to costs that "any convergence between revenue and expenses is meaningless."[193]

80. The CPUC states that the Hausman price study provided by AirTouch in its second-round comments demonstrates that state regulation has not dampened pricing flexibility, and confirms the difficulty of using published rates to analyze price changes. California argues the rate decreases shown by the AirTouch study are similar to those in unregulated markets, at the same time raising varied methodological issues about the study. The CPUC specifically challenges AirTouch's argument that capacity constraints explain high Los Angeles rates, as unsupported and inconsistent with the argument that regulation has occasioned higher rates there and in New York.[194] The CPUC asserts that the Hausman study also disregards conflicting data, ignores standard econometric techniques for establishing causality, and misuses the economic control variables it does consider, so that no relation between state regulation and rates, much less causality, is demonstrated.[195]

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[190] *Id.* at 25-26. The Cellular Resellers state that in the 1989-1993 period basic rates changed negligibly while number of customers increased substantially. *See* Cellular Resellers Supplemental Comments at 2-3.

[191] CPUC Supplemental Reply at 32.

[192] *Id.* at 28-29.

[193] *Id.* at 29-30.

[194] *Id.* at 31-32.

[195] *Id.* at 32-33.

c. Capacity Utilization

81. The CPUC and its supporters contend that cellular carriers' capacity is not being fully utilized and that this fact, rather than spectrum scarcity, accounts for the excessive rates and profits characteristic of cellular service.[196] The CPUC points out that the capacity for carriers in the Los Angeles and San Francisco MSAs, in particular, is significantly underutilized.

82. The cellular carriers argue that the dramatic growth rates for cellular systems in California, demonstrated by the CPUC's own subscriber growth data, contradict the CPUC's contention that carriers are intentionally restricting capacity.[197] Several commenters also point out that excess capacity is consistent with efficient network planning because cellular service does not experience economies of scale, so that additions to capacity are best made in "lumpy" investments.[198]

83. The cellular carriers also assert that the CPUC has ignored the effects of uneven usage attributable to variations in population density within a market and commuting patterns for which cellular systems must be able to accommodate demand during the busiest hours.[199] AirTouch notes that 19 percent of subscriber usage in Los Angeles is concentrated in less than one percent of that area served and asserts that the overall increase in demand sought by the CPUC would not increase usage of less heavily used sites or spare already-congested ones.[200] The carriers emphasize their "legitimate" concerns for high quality transmission and call-completion ratios and point out that the potential for blockage and service degradation increases when cell cites are used in excess of full capacity.[201]

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[196] CPUC Petition at 51-54. *See also, e.g.*, Comments of Utility Consumers' Action Network and Towards Utility Rate Normalization (UCANTURN) at 1-2; Supplemental Comments of the Cellular Resellers at 4.

[197] *See, e.g.*, Comments of Bakersfield at 10; BACTC at 34; GTE at 20; Supplemental Comments of AirTouch at 16-17; L.A. Cellular at 39. AirTouch, in particular, contends that, from 1984 to 1994, the Los Angeles system increased customers dramatically, increased cell sites from 13 to 415, and expanded capital investment from $10 million to $550 million. AirTouch Supplemental Comments at 17-18.

[198] Comments of CCAC, Appendix A at 28; Supplemental Comments of CCAC at 15-17; AirTouch at 17.

[199] *See, e.g.*, Supplemental Comments of L.A. Cellular at 8-9; CCAC at 15-17; Supplemental Reply of GTE at 3-4.

[200] AirTouch Supplemental Comments at 16-17.

[201] *Id.* at 14-15.

d. Rates of Return

84. As the gravamen of its argument, California alleges that cellular carriers in the State are earning excessive rates of return.[202] The CPUC defines excessive returns as "profits due solely to a failure to compete in a duopolistic market," and states that evidence of improper pricing would be pricing so high that it discourages use of the system, or failure to invest in system expansion when it is economically justified.[203] The CPUC believes that rates of return, when considered together with other factors, are relevant indicators of the market power of cellular carriers.[204]

85. California asserts that the six cellular carriers in the three major urban markets earned returns during the period 1988 to 1993 averaging 30.9 percent.[205] For example, California states that L.A. Cellular earned an average after-tax accounting rate of return of 56.2 percent for the last five years, while the Los Angeles MSA earned 37.9 percent.[206] Similarly, California states that BACTC's rates of return ranged from 31.1 percent in 1992 to 49.5 percent in 1993.[207] It finds no evidence that the risk faced by cellular carriers justifies returns as high as those in the major metropolitan areas.[208] California attributes the existence of high profit margins to the lack of perfect substitutes for cellular service and the exclusion of potential market entrants due to the dual license structure.[209]

86. The CPUC's analysis is based on after-tax accounting rates of return on net plant derived from carrier-provided unaudited annual reports to the CPUC.[210] The CPUC and its supporters argue that, as in the case of this Commission's cable and telephone rules,

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[202] *Id.* at 46-51.

[203] CPUC Petition at 50-51.

[204] *Id.* at 47.

[205] CPUC Supplemental Reply at 17.

[206] CPUC Petition at 48-49 & Appendix F.

[207] *Id.*

[208] *Id.* at 48; CPUC Supplemental Reply at 17 n.34.

[209] CPUC Petition at 50.

[210] *Id.* at App. F.

the rate base should not include the value of spectrum because carriers do not own the airwaves and including their value in the rate base "masks the duopoly profits."[211]

87. The cellular carriers disagree with the CPUC's analysis of the rate of return data. They argue that higher rates of return are appropriate because cellular is riskier than other telecommunication services[212] and that growth is an important factor in assessing market conditions and rates of return.[213] They also argue that operating profits are not excessive when they are used to increase service availability and enhance capacity, and GTE states that it has invested substantial sums for these purposes.[214] L.A. Cellular notes that, in an earlier decision, the CPUC found that cellular rates and rates of return were neither unreasonable nor excessive.[215] They also disagree with the CPUC's methodology for computing rates of return.

88. Specifically, the cellular carriers assert that California has erred by using an "accounting" as opposed to an "economic" rate of return; *i.e.*, by failing to consider return over the entire life of the system.[216] AirTouch contends that accounting rates of return are often a poor guide to true economic rates of return, which must take account of decreasing equipment prices, rapidly depreciating network infrastructure (resulting from conversion to digital), the inherent problems in valuating spectrum, and the replacement cost of acquiring new customers.[217] BACTC agrees, asserting that the CPUC should not use an accounting analysis because it is static and unable to assess future changes or results, including new competition and opportunity costs.[218]

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[211] CPUC Petition at 56-61. The CPUC adds that "[t]he difficulty in quantifying spectrum value is one of the reasons the CPUC has declined to adopt a cost-of-service regulatory structure for the cellular industry." *Id.* at 57.

[212] *See* Comments of AirTouch, Hausman Affidavit at 17, in which he advocates use of the capital asset pricing model and a 20.7 percent benchmark as a fair rate of return.

[213] *See, e.g.*, Comments of Bakersfield at 11.

[214] GTE Comments at 20; L.A. Cellular Reply at 36-37 & Fig. 8.

[215] L.A. Cellular Reply at 6-7.

[216] *See, e.g.*, Comments of AirTouch at 55-56; BACTC at 26; CCAC at 16 & Appendix A at 22; GTE at 19; McCaw at 43-44 (also asserting that start-up losses should have been capitalized and included in firms' rate bases).

[217] AirTouch Comments at 55-56.

[218] BACTC Comments at 26.

89. In response, California reiterates its argument that rates of return for cellular carriers are twice as high as those earned by the average firm in the telecommunications industry and notes that they are understated to the extent that investments have been financed with leveraged capital.[219] It points out that accounting returns are relied upon by Federal regulators and the investment community[220] and that the cellular carriers concede that an economic rate of return is difficult if not impossible to compute for an entire firm.[221]

90. In support, the Cellular Resellers argue that accounting rates of return represent return on investments actually made, whereas economic rates of return represent return on replacement or reproduction value of an entire system, including spectrum.[222] They argue that the carriers "would like to earn money on investments they have not made,"[223] but that this Commission, like other regulatory agencies, has for decades rejected such arguments on the grounds that investors are only entitled to a fair return on their actual investment and not a return on the reproduction or replacement value of the company's assets.[224]

91. The cellular carriers also criticize the CPUC for relying on rate of return figures for only the largest and most profitable markets.[225] AirTouch asserts that in Santa Barbara, the RSAs, San Diego, and San Francisco Block B, the rates of return are at or below competitive levels and that rates of return for the two cellular carriers in the Los Angeles market have decreased by 46 percent and 52 percent over the last five years and would decrease more if the CPUC would stop rate-regulating those markets.[226] CCAC adds

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[219] CPUC Reply at 37; Supplemental Reply at 18. California states that firms in Value Line's Telecommunications Services Industry group have, on average, a 13.9 percent rate of return.

[220] CPUC Reply at 36.

[221] *Id.* at 41.

[222] Cellular Resellers Reply at 39-45.

[223] *Id.* at 40.

[224] *Id.* at 41, citing, *inter alia*, Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 605-14 (1944); 1990 Rate Rep., 5 FCC Rcd 7507, 7521 (1990) (common carriers not entitled to a return on the "fair value" of their investment on the basis of the company's market value).

[225] GTE Comments at 19-20; *accord* L.A. Cellular Reply at 11, 28, 30-31.

[226] AirTouch Comments at 56-57; *see also* L.A. Cellular Supplemental Reply at 6.

that the wide differences in rates of return between large and medium or small markets are not indicative of market power since all markets are duopolies.[227]

92. In response, the CPUC asserts that the largest California markets represent most consumers of cellular services and that rates of return in these markets have ranged from 18.7 percent to 56.2 percent in the last five years, even though this was a period of severe economic recession in the State.[228] The Cellular Resellers agree with the relative weight to be placed on rate of return data in smaller as opposed to larger cellular markets and note that the carriers in the smaller markets serve only 15 percent of California's subscribers, have been in operation fewer years and serve markets with lower population densities.[229]

93. The cellular carriers also argue that California erred in disregarding the value of scarce spectrum in calculating rates of return, even where a system was obtained via a set-aside rather than purchase.[230] L.A. Cellular contends that "[w]hen account is taken of up-front acquisition costs, the profit levels cited by the CPUC must be reduced by at least 50%."[231] The carriers suggest several methodologies for valuating spectrum, including using the results of the narrowband PCS auction as a guide.[232]

94. In response, California points out that a majority of carriers acquired their spectrum for free[233] but adds that, in any event, there can be no opportunity cost for cellular spectrum because it has no alternative use under present guidelines established by this

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[227] CCAC Supplemental Comments at 12.

[228] CPUC Reply at 35.

[229] Cellular Resellers Supplemental Comments at 4 & Supplemental Reply at 7. *But see* Supplemental Reply of L.A. Cellular at 4-5, disputing allegation that major markets were given a "head start."

[230] *See* Comments of AirTouch at 59 & n.185, Exhibit E at 15 & n.18; L.A. Cellular at 25-27; CCAC at 29-52; CCAC Reply at 14. *See also* Comments of McCaw at 45, Owen Affidavit appended thereto at 22-24.

[231] L.A. Cellular Supplemental Reply at 6.

[232] L.A. Cellular Comments at 27. *But see* CPUC Supplemental Reply at 23, arguing that a comparison of the per POP spectrum value for narrowband or, more appropriately, broadband PCS based on auction results with that for cellular spectrum reveals cellular's present and continuing ability to extract economic rents reflective of the duopoly market structure.

[233] CPUC Supplemental Reply at 22.

Commission.[234] The CPUC argues that including spectrum value in the rate base would artificially reduce the apparent profit and that, following this approach, any entry barrier could be eliminated as the source of duopoly profits and simply turned into a "cost of doing business" through reclassification as a capitalized investment.[235] California notes that the carriers' capital accounts may already reflect at least some measure of the costs that cellular carriers have incurred in license acquisition,[236] and observes that L.A. Cellular, trying to avoid increased tax liability, admitted to the California Board of Equalization that spectrum holds no value and should not be factored into earnings.[237]

95. In support of the CPUC's position, L.A. County contends that, because cellular licenses are scarce, their market price is bid up well in excess of actual cost.[238] It contends that "only about one-tenth of the capitalized 'value' of a cellular franchise is attributable to investments in tangible system assets, the balance representing the premium ... either paid by a purchaser of a cellular franchise or imputed ... even where the license was acquired without any cost whatsoever ...."[239]

E. Discussion

96. In order for a state to prevail on the merits, Section 332(c)(3)(B) requires it to demonstrate that market conditions fail to protect subscribers adequately from unjust and unreasonable rates, or unjustly or unreasonably discriminatory rates. Based on a preponderance of the evidence, we conclude that California's demonstration does not satisfy the statutory standard. Therefore, we deny the CPUC's request to retain cellular rate regulation authority through March 1, 1996.

97. The principal bases for our decision are straightforward. First, unrebutted evidence shows that cellular rates in California are declining. Second, the CPUC Petition does not address the direct and fundamental changes to the duopoly cellular market structure that are being realized by PCS and other services, such as wide area SMR. Third, the CPUC presents no evidence of systematically collusive or other anticompetitive practices concerning the provision of any CMRS. Fourth, the CPUC does not present evidence showing

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[234] *Id.* at 21.

[235] CPUC Reply at 51-56, citing Hazlett, "Errors in the Haring & Jackson Analysis of Cellular Rates," attached as Appendix M, at 9. *See also* CPUC Supplemental Reply at 21-22.

[236] CPUC Reply at 48.

[237] *Id.* at 54-56.

[238] L.A. County Comments at 27-28, 39-42.

[239] *Id.* at 35.

widespread consumer dissatisfaction with CMRS providers in that state, or discuss what specific rate regulations are needed to address whatever level of dissatisfaction may exist.[240] Fifth, the CPUC fails to advance any persuasive analysis regarding the critical issue of investment by cellular licensees (or by any other CMRS providers). An important indicator of market failure, in our view, would be evidence that cellular firms are withholding investment in facilities as a means of restricting output and thus boosting price. No such demonstration exists on this record.

98. Another weakness of the CPUC's Petition is that it views any evidence of market imperfection as proof of a need for continued rate regulation, while all countervailing evidence is attributed to its regulatory oversight. Even assuming such an argument is reasonable in theory, the CPUC has not established its factual predicate. The CPUC does not appear to have prescribed any particular pricing or rate development formula, and with minor exceptions, all currently effective and previously effective cellular rates in California appear to have been carrier-initiated.[241] On this record, we are not persuaded by the CPUC's implicit argument that, absent continuation of its rate regulation authority, even for a limited period of time, cellular rates will quickly fall outside the zone of reasonableness.

99. We find the CPUC case, when viewed as a whole, to be unpersuasive. Examining each element of that case leads us to the same conclusion.

1. Structure

100. The CPUC's case consists in major part of a traditional antitrust analysis of the market for cellular services in California. The analysis includes empirical calculations of the market's level of concentration,[242] and is fleshed out by references to the conclusions

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[240] The CPUC concedes that consumers "rarely" file formal complaints against cellular carriers. CPUC Reply at 85. Although the CPUC asserts it receives "hundreds" of informal consumer complaints annually, it provides no other details about such complaints. *See id.*

[241] It is our understanding that the percentage difference between wholesale and retail rates in carriers' tariffs (*i.e.*, the so-called"reseller margin") was structured initially by carriers themselves, not the CPUC. There has never been a Federal requirement that carriers offer separate wholesale and retail rates. *See Cellular Resale Order*, 6 FCC Rcd 1719, 1726 (1991).

[242] The most widely used measure is the so-called Herfindahl-Hirschman Index, or HHI. *See* Scherer and Ross at 72. The HHI is calculated by squaring the market share of each market participant and then adding the squares, with the sum representing the degree of market concentration. In merger cases this calculation is made for both "pre-" and "post-merger" markets, the difference being the increase in market concentration that will result from the merger. The higher the pre-merger number, and the greater the increase to that number a merger will cause, the more likely the merger may violate the antitrust laws. *See* FTC v. PPG Industries, Inc., 798 F.2d 1500, 1503 (D.C. Cir. 1986); *see also* Scherer and Ross at 72. One portion of the CPUC's case appears to utilize a derivative of the HHI (*i.e.*, a Herfindahl Index), but the use of this alternative measure is without

of others who had examined the market prior to the CPUC's filing in August 1994 and found it to be less than fully competitive, including the U.S. Department of Justice.[243] California also highlights the existence of interlocking ownership interests among various carriers,[244] and argues that these relationships weaken competition. We do not dispute the analysis of past market conditions offered by the CPUC, nor doubt the existence of the ownership arrangements it cites. Indeed, as noted previously, the CPUC could have presented even more analysis of this nature, including various examinations of the cellular market structure by this Commission and the General Accounting Office.

101. Several observations about these materials are in order, however. First, although the market analyses offered by California are conducted from the perspective of the antitrust laws, the CPUC disclaims the argument that antitrust standards are the appropriate measure of market conditions in a proceeding under Section 332(c)(3)(A). Taking that disclaimer at face value, it is not obvious why antitrust-oriented analyses should be accorded decisional weight in this proceeding. Moreover, as noted previously, Congress was well aware of the historical condition of the market for cellular service in 1993 when it broadly prohibited state rate regulation of CMRS. It easily could have made traditional antitrust considerations the yardsticks for evaluating state petitions, but it did not. To the contrary, the record indicates that Congress affirmatively declined to adopt this approach.[245] California has not explained how a standard apparently rejected by Congress could thereafter become the centerpiece of the test for evaluating state petitions.

102. Second, although the CPUC claims that interlocking ownership interests weaken competition among the cellular carriers involved, its case on this point is entirely theoretical. The CPUC offers no direct or indirect proof that such arrangements actually are having *any* impact on competition. Moreover, the mere existence of such arrangements demonstrates little because this ownership pattern is partly a consequence of our initial cellular licensing procedures, which encouraged settlements and thus led to the creation of

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analytical or decisional significance because the two indices are essentially the same.

[243] On July 25, 1994, the U.S. Department of Justice filed a Memorandum in Response to the Bell Companies' Motions for Generic Wireless Waivers with the United States District Court for the District of Columbia Circuit, Civil Action No. 82-0192 (DOJ Memorandum). In that document, DOJ states that the "cellular exchange service markets are not competitive today." *Id.* at 13-14. The DOJ Memorandum is referenced at various points in the filing of the CPUC and its supporters. *See, e.g.*, CPUC Comments at 27.

[244] Petition at 27-28, Appendix C.

[245] Legislative history materials submitted by the Cellular Resellers suggest that amendments designed to make antitrust standards the test of Section 332(c)(3)(A) petitions were offered in committee and explicitly rejected.

partnerships in certain instances.[246] Thus, we accord little weight to the CPUC's claims on this point.

103. Third, the CPUC's analysis does not fairly reflect the speed at which CMRS market structure conditions affecting cellular services are evolving. To some degree this may be attributed to the fact that the CPUC's petition dates back to August 1994 and, as witnessed by the substantial presentation the state makes, required several months' preparation before then. During the intervening period we, *inter alia:* (1) completed our proceeding to establish broadband PCS services, pursuant to which we will license six new CMRS competitors to existing cellular providers; (2) utilized our pioneer preference procedures to award a 30 MHz broadband PCS license in the Los Angeles MTA; and (3) concluded an auction of the remaining 30 MHz MTA broadband PCS licenses throughout California (and the Nation). During this period an additional two-way mobile voice and data service provider, Nextel, also has significantly developed as a competitive alternative to cellular services.[247] The CPUC was not in a position to factor these developments into its own estimate that competitive market conditions will be sufficiently developed to warrant elimination of state rate regulation authority by March 1, 1996. The more relevant observation, however, is that their occurrence provides a reasonable basis to conclude that the CPUC's estimated timetable should be shortened.

104. Our own view is that an influx of additional competitors is a far superior solution to perceived cellular market inadequacies than continued rate regulation. More importantly, Congress embedded in the OBRA this preference for permitting market forces to develop rather than to rate regulate existing licensees, and that informs our judgment of petitions under Section 332(c)(3)(A). On this record, we conclude the CPUC has failed to demonstrate that the structure of the market for cellular service provides a basis for continuing state rate regulation authority.

2. Conduct

105. The ''conduct'' component of SCP analysis may be thought of as an examination of a market to identify any specific acts by participants that illustrate imperfect market conditions. The CPUC presents two examples in this regard. First, it claims that cellular carriers tacitly collude to price their services in parallel. Second, it asserts that

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[246] *See* Amendment of the Commission's Rules To Establish New Personal Communications Services, 9 FCC Rcd 4957, 5002 (1994).

[247] Although the record contains various expressions of doubt concerning Nextel's ability to mount viable competition to cellular operators, the company recently appears to have secured over $1 billion in financial backing from investors with long experience and success in mobile telecommunications operations. *See Business Week*, Apr. 17, 1995, ''McCaw Is Getting A Lot More Than A Chunk Of Nextel.''

carriers are using long-term service contracts in ways that demonstrate market conditions warrant continued state rate regulation.[248]

106. The CPUC's case on these points is flawed in several significant respects. To begin with, parallel pricing is consistent with a variety of economic models of industrial organization,[249] and some of these models include situations in which the subject prices are reasonable (such as perfect competition). Absent evidence of actual pricing collusion or a related indication of market failure -- and the CPUC has provided none -- the existence of pricing similarities does not automatically demonstrate unreasonable market conditions. We are particularly constrained from according significant weight to this aspect of the CPUC's case in view of its tariffing requirement, a regulatory device that tends to facilitate pricing commonality.

107. We also are unpersuaded by the CPUC's presentation regarding carriers' uses of long-term service contracts. The CPUC's problem is not with such contracts *per se*, as it continues to permit their use. Rather, California contends that "automatic renewal" provisions within such contracts, and evidence obtained by the California Attorney General's Office suggesting that certain carriers may be attempting to utilize such contracts to thwart PCS entry, demonstrate that market conditions are unjust and unreasonable.

108. Even if we take as given the CPUC's determination that certain automatic renewal provisions are unreasonable, it does not follow that the existence of such provisions demonstrates market failure under Section 332(c)(3)(A). Unreasonable business practices can and do arise in competitive markets. Without more, such practices are not necessarily suggestive, much less conclusive, with respect to market conditions. This portion of the CPUC's case simply fails to establish a sufficient nexus between the narrow practice complained of and the relevant, and much broader, statutory test.

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[248] CATA presents a third "conduct" example. Specifically, CATA asserts that cellular carriers increasingly distribute services through their own sales forces and "major mass merchandisers," rather than through independent agents, in an attempt to monopolize the cellular equipment market. This assertion is all sail and no rudder, as CATA supplies no evidence to buttress its claim. We previously have rejected bare allegations that the impact on resellers of cellular carriers' choice of product distribution systems constitutes adequate evidence of an attempt to monopolize the markets in which cellular service and equipment are provided. *See* Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd at 4028, 4031-32 (1992). CATA provides no basis to revisit those issues here.

[249] *See* Scherer and Ross at 200-15. Predictions of similar prices can arise in two ways. First, if two firms produce products that are similar, a firm charging substantially more would lose most of its customers. Second, if cost and demand are similar, then mathematical calculations of the companies' optimal pricing strategies tend to be similar.

109. These considerations alone are sufficient to discount these practices as insufficiently material to the statutory standard to warrant according them significant weight. We also note, however, that we are not prepared on this record to determine whether state oversight of such practices is precluded under the terms of OBRA as "rate regulation," or whether such oversight may be retained by the states as "terms and conditions" regulation. *See* Section VI, *infra,* Regulation of Other Terms and Conditions.

110. The more troublesome CPUC allegation concerns the use of long-term contracts to "lock down" cellular carriers' customer bases and thereby prevent or delay subscribers from taking advantage of competitive PCS alternatives. We view this allegation seriously because such conduct, if true, strikes at the heart of Congress's plan to build a robustly competitive mobile telecommunications marketplace by significantly increasing the spectrum available for such services. We accord more weight to this CPUC allegation than its parallel pricing contentions because the former is buttressed by evidence drawn from the record of an on-going investigation by the California Attorney General's Office. In the context of the instant proceeding, however, the key term here is "on-going." To our knowledge, neither the Attorney General nor the CPUC has acquired sufficient evidence to support even the initiation of formal action against the carriers to whom the "lock-down" evidence relates. Since the existing evidence apparently is inadequate to support CPUC action under its existing authority, we conclude that such evidence does not constitute an adequate brief for continuing such authority.[250]

3. Indicia of Performance

111. The "indicia of performance" component of SCP analysis may be thought of as an examination of empirical evidence of market behavior. We perform such an examination here to determine whether the CPUC has satisfied the statutory requirement of demonstrating that "market conditions ... fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." As discussed previously, we view this as a question whether market operations fail to produce rates that fall within a "zone of reasonableness," which is defined by reference to consumer interests, investor interests, and broad-based public policy considerations. Such an inquiry focuses foremost on cellular prices and profits.

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[250] We note that our denial of the CPUC's petition to retain its rate regulation authority does not prevent that agency, or the California Attorney General, from continuing to monitor the business practices of CMRS providers in that state. If such oversight yields more conclusive evidence that cellular carriers are attempting to forestall competitive PCS entry, or are engaging in other specific anticompetitive activities, we would entertain a CPUC petition to initiate targeted rate regulation measures designed to address such carrier actions, and would consider initiating such measures under our own authority, even absent a filing by the CPUC.

a. Prices

112. The initial issue we confront is how to analyze the wealth of price data in the record. Although the two major standard components of cellular prices are monthly, flat-rate access charges and per-minute airtime charges, customer bills are driven in part by other variables, including "free" airtime offered with certain pricing plans, termination charges (if any) and contract length (monthly or for a period of months or years). Such variables complicate the task of analyzing pricing data and raise two questions: (1) can the record data be categorized in a way that facilitates meaningful analysis; and (2) what data are the most meaningful?

113. The first of these questions is the easier to answer. In general, most parties, including the CPUC, analyze prices by focusing on monthly price for standardized usage levels (*e.g.*, 60, 120, 480 minutes).[251] Although this is not the only way to address the data, we agree it is a reasonable one.

114. There is less agreement among the parties on the second question. The CPUC claims that each carrier's "basic" monthly rate supplies the most meaningful point of reference for price analysis. They argue that nominally cheaper packages typically require the customer to sign a long-term contract (one year or more) and thus are not necessarily better deals.[252] On the other hand, most carriers claim the "best price" available in the market at any given point in time should be the focal point of analysis, on the theory that customers for cellular service are rational consumers who may be presumed to respond to price incentives. This is not an academic debate. California notes that basic prices were largely unchanged during the 1989-1993 period to which the CPUC-supplied evidence relates.[253] Carriers note that customers have, in fact, responded to price signals to the point where by 1994 less than 20 percent of cellular subscribers remain on a basic plan.[254]

115. All parties agree that prices are not going up. The CPUC claims that price data demonstrate poor market price performance from a consumer standpoint, however, given the returns that prices are generating for carriers. The CPUC also notes that the rates

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[251] California actually uses price per minute. The use of price per minute for 60 minutes vs. price per month for 60 minutes is exactly equivalent.

[252] CPUC Petition at 37.

[253] *Id.* at 40-42.

[254] *See, e.g.*, CCAC Comments at 13 (Charles Rivers Associates study); L.A. Cellular Comments at 10-11, 18.

of major California carriers remain among the highest in the Nation,[255] and claims that "regulation in California probably has prevented rates from being even higher and certainly has not contributed to higher rates."[256]

116. In contrast, the carriers claim that prices actually decreased substantially when nominal price changes are adjusted to account for inflation (yielding the "real" price change). They note that service coverage areas have improved, giving customers more for their money.[257] Certain carriers also argue that their mix of customers has changed during the relevant period, resulting in a sharp decline in revenue per subscriber that also should be factored into our analysis.[258] The carriers also assert that our analysis should focus on recent price movements because such movements provide a more accurate indications of the current state of market conditions. Finally, carriers assert that CPUC regulation is the principal cause of high cellular prices in California.[259] Hausman, for AirTouch, estimates that such regulation causes California cellular customers to pay at least $240 million per year in higher cellular prices.[260] To illustrate this, he submits data on prices in 10 cellular service areas across the nation showing that, of those markets, four were state-regulated and those four had the highest prices.[261]

117. The parties also vigorously debate the question whether the high price of cellular services in California, relative to prices in some other areas of the country, are driven by a shortage of spectrum. The CPUC views this question in the negative,[262] while other parties assert that spectrum scarcity is a major contributor to cellular rate levels.[263]

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[255] Petition 45-46. Their source for this statement is the U.S. General Accounting Office, *Telecommunications Cellular Service Competition,* Testimony before the Senate Committee on Energy and Public Utilities, Legislature of the State of California, Jan. 12, 1993, at 7.

[256] CPUC Petition at 46.

[257] Comments of Bakersfield Cellular Telephone Company at 10-11.

[258] *See, e.g.,* AirTouch Supplemental Comments at 9 (revenue per subscriber decreased 47 percent between 1990 and 1993).

[259] AirTouch Opposition at 43-45.

[260] AirTouch Opposition, Hausman Affidavit at para. 11 and AirTouch Comments to Confidential Data, Hausman Affidavit at para. 22 & n.9.

[261] Hausman at para. 9.

[262] CPUC Reply at 74-77.

[263] GTE Comments, Appendix A at 8; AirTouch Opposition at 59.

118. Many of these arguments are unpersuasive. For example, the CPUC's focus on basic prices is unconvincing, because only a minority of customers remain on basic plans, and that minority gets smaller each year. As a result, focusing on movements of basic prices does not provide an accurate picture, or a reasonable surrogate indicator, of overall cellular market performance. The CPUC's argument that market conditions must be unreasonable because cellular prices are "too high" (*i.e.*, they exceed accounting measures of underlying costs) also is unpersuasive, since on this record it appears the CPUC has never exercised its existing authority to require "cost-based" rates, and it presents no persuasive argument concerning the degree to which rates must be "cost-based" in order to fall within a zone of reasonableness. The carriers' claim that adjusting nominal price data for inflation would improve our analysis of price performance is theoretically sound, but it suggests that potentially countervailing technical adjustments would need to be made to preserve analytical integrity. Since the record does not contain the information needed to make even the most basic of these additional adjustments (*e.g.*, productivity), it is reasonable to limit our analysis to nominal prices.[264]

119. Before doing so we consider the carriers' principal argument. Essentially, they claim that no matter what condition the market is in, state regulation makes that condition worse from a consumer standpoint. As a threshold matter, it is not obvious that the quality or effectiveness of a state's rate regulations are necessarily matters of decisional significance in a proceeding under Section 332(c)(3)(B). We need not resolve that legal issue here, however, in view of the evidence the carriers and the CPUC offer on this point. California's assertion that its regulation keeps prices from being even higher is based indirectly on work by Shew.[265] This is contrasted in this record by Hausman's work purporting to demonstrate that state regulation raises cellular prices.[266] Both Hausman and Shew use econometric models in an attempt to determine what factors have a statistically significant impact on cellular prices. A key difference between Shew's and Hausman's work

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[264] In this regard, we note that the telecommunications portion of the consumer price index increased only about one percent for the whole period from 1989 through 1993. Productivity gains in the telecommunications sector of the economy are generally thought to have been much higher during this period.

[265] *See* California Petition at n. 27; and AirTouch Opposition, Appendix G (Statement of Professor Kahn). California cited to comments by Alfred Kahn concerning an American Enterprise Institute study on cellular rates and regulation. AirTouch included a transcript of those comments, which revealed that the research was Shew's and was ambiguous on the impact of regulation.

[266] AirTouch Opposition at Appendix E. Hausman also uses a table (at Appendix E, 4) of cellular prices in the top 10 MSAs to illustrate that cellular prices are higher in markets with state regulation than in markets without state regulation. We find this illustration unconvincing because we note that the populations in the those MSAs with state regulation in Hausman's table are much higher (about double on average) than in MSAs without regulation in that table. *See* Appendix B at 14. It is therefore unclear from that limited sample whether state regulation (as opposed to population density or some other cause) really causes higher cellular prices.

is that Hausman uses a single dummy variable for regulation, whereas Shew uses several more descriptive variables, including a variable for the number of days prior to a price change becoming effective (Filetime), a variable for whether regulatory approval is required for a price change, and a variable for a state legislative ban against state regulation of cellular.[267] Shew finds that the threat of regulation lowers prices, but that specific regulatory regimes may raise prices. When one substitutes California's description of its current regulatory regime into Shew's equations, including one day for the Filetime variable, the results show the predicted impact of regulation is extremely minimal.[268] Using thirty days as the Filetime variable yields a more pronounced impact. Although certain carriers claim that California mischaracterizes its regulatory regime, and this suggests it might be appropriate to use thirty days for the Filetime variable, the record on this point is not sufficiently strong to resolve the issue. Since these econometric models appear to produce results that are insufficiently robust with regard to the exact model specified, we do not accord them any weight in our analysis.

120. We also do not agree with the claim that price levels result in substantial part from spectrum scarcity. Essentially, this is an argument that market performance in California is not influenced by the number of licensed cellular systems. We are not persuaded by this argument. The theoretical case that the number of competitors in a market significantly effects rivalry therein is strong, and nothing on this record convinces us that this traditional thinking is inapplicable to cellular. Assertions about scarcity run counter to the carriers' demonstrated ability to accommodate additional demand by, inter alia, splitting cells and deploying digital technologies that vastly expand spectrum efficiency. Even in Los Angeles, where demand appears to be strongest, claims of capacity constraints are belied by continued subscriber growth.[269]

121. As a check on the reasonableness of the parties' presentations on the issue of cellular prices, we performed our own analysis of price and cost data. In so doing we created three indices of "best prices" available to a new customer for 60 minutes, for 120 minutes and for 480 minutes (80 percent of the minutes being peak use). To allow us to consider the price and cost data on a state-wide basis, we weighted the data by carrier-specific subscribership information supplied by the CPUC. Since data for every carrier during every time period were not supplied by the parties, we created several indices

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[267] W. Shew, Regulation, Competition, and Prices in Cellular Telephony, working paper prepared for American Enterprise Institute for Public Policy Research, June 2, 1994, at 57-62.

[268] *See* Shew Table 5-1. Actually, the predicted effect is to lower prices by about two dollars per month.

[269] Data supplied by the CPUC indicate that the 1993 customer base of the two licensees in Los Angeles is several multiples larger than the customer base of the two licensees in San Francisco that year. This differential does not appear to be attributable to differences in the relative sizes of the geographic areas served by licensees in those cities.

covering slightly different time periods and groups of carriers.[270] We also focused on prices in a smaller geographic area (Los Angeles).[271] Finally, we created cost-per-subscriber indices to correspond to our price indices.[272]

122. Our analysis indicates that depending on the number of minutes, average nominal prices fell between 10.5 and 15.5 percent overall during the 5 year period for which data are available (1989-93). The bottom line is unambiguous: cellular prices are falling, and falling appreciably. Moreover, a major portion of the decline occurred in the last year. The average best 60 minute price fell from 1989 to 1990 by $1.60, and by two more cents between 1990 and 1992. Between 1992 and 1993, however, this index fell $4.56. Since 1993, prices have continued to fall. The best price in the Los Angeles area for a 60 minute plan fell by more than 15 percent during 1994 alone. Carriers also have offered promotions, such as waiving activation fees, not reflected in our indices but that clearly reduce the price available to consumers. Average revenue per subscriber is falling faster than the average cost of serving subscribers, demonstrating that carriers' per-subscriber profit margins are shrinking. On the whole, this evidence reflects a positive price performance pattern, and undercuts the CPUC's claim that market conditions fail to protect consumers adequately from unjust and unreasonable, or unjustly and unreasonably discriminatory rates.

b. Profits

123. The CPUC points to carriers' profits as evidence that conditions in the market for cellular services are unreasonable from a consumer standpoint. In brief, the CPUC argues that carriers consistently earn returns far above competitive levels, and that such returns are evidence of market power, as opposed to a reflection of the riskiness of the cellular business or spectrum scarcity.[273] The CPUC argues that the numerical level of such returns are not unreasonable per se, but should be viewed as such in this context because they reflect a failure to compete, as opposed to being used to expand capacity and increase service availability.[274]

124. A few preliminary observations are in order before we address the merits of the CPUC's presentation in detail. First, we agree with the CPUC that the numerical level of an entity's profits, standing alone, generally does not determine whether such profits are reasonable. The appropriate measure of profits is whether they fall within a zone of

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[270] *See* Appendix B at Tables 2-3.

[271] *See id.* at Table 6.

[272] *See id.* at Tables 4-5.

[273] *See* CPUC Petition at 46-50, 54-61.

[274] *See id.* at 50-54.

reasonableness, which is defined by reference to consumer and investor interests viewed in the context of relevant public policy considerations. Second, it bears emphasis that the purpose of this proceeding is to determine whether the CPUC will retain cellular rate regulation authority by demonstrating that market conditions fail to protect consumers adequately against unjust, unreasonable, and unreasonably discriminatory cellular rates. The CPUC has raised the issue of profits in support of its argument for retaining such authority, and we are evaluating it on that basis and toward no other end. This is not a proceeding to determine whether any particular carrier's profits are reasonable or what rate of return (if any) is reasonable industry-wide.

(1) Measures of Profits

125. We begin our analysis by considering available profit data. As a threshold matter, we disagree with commenters who claim that profit analysis is infirm insofar as it focuses on accounting rates of return.[275] The CPUC could not be expected to provide a direct measure of economic profits because that would require financial data from an investment's beginning to end. Even assuming such data exist, they would be too dated to be meaningful for purposes of the instant proceeding, which is focused on contemporary market conditions. We agree with the CPUC that, with exceptions no party shows are present here, accounting profits tend to be high when economic profits exist.[276] The contention that only economic profits should be considered is extreme and inconsistent with the reality that agencies such as ourselves and the CPUC must make decisions on available information. Thus, we conclude it is reasonable to use accounting data *as a baseline* for analyzing profits in the context of a Section 332(c)(3)(B) proceeding.

126. California provides a significant amount of data relating to profits, including after-tax rates of return and gross plant investment, for 16 of the 40 carriers in that state. These carriers serve markets covering about 90 percent of the state's population. We also reviewed financial reports filed by certain carriers with the CPUC, which added 7

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[275] Accounting rates of return measure the return for a company or subsidiary for a fixed period of time, typically annually. Economic rates of return measure the return for a specific investment or set of investments over the life of that investment. These two measures of return also differ in their treatments of certain costs. For example, depreciation rates for accounting purposes are determined by factors, such as the tax code, which may not perfectly correspond to the actual useful life of equipment. Economic rates of return are based on actual useful life. *See, e.g.*, Oppositions of AirTouch at 55-56 and Bay Area at 26.

[276] California Reply at 38-41. *See also* F. Fisher & J. McGowan, *Firm Interdependence in Oligopolistic Markets*, 73 AM. ECON. REV. 82 (Mar. 1983); W. Long & D. Ravenscraft, *Misuses of Accounting* Rates *of Return: Comment*, 74 AM. ECON. REV. 494 (June 1984); S. Martin, *Misuses of Accounting Rates of Return*: *Comment*, 74 AM. ECON. REV. 501 (June 1984).

additional carriers to our data set.[277] Using these data, we estimate the after-tax rate of return for these carriers as a whole, weighted by gross plant, to be approximately 30 percent for the period from 1989-1993.[278]

127. Several arguments in the record have a bearing on how this aggregate profit estimate should be evaluated. Hausman (for AirTouch) asserts that cellular is a riskier business than local wireline telephony, and therefore cellular carriers are entitled to a higher return than local exchange carriers.[279] According to Hausman, this risk argues for use of a capital asset pricing model (CAPM) to estimate an appropriate return for cellular, a process that he claims results in earnings calculations exceeding 20 percent. We note that other record materials authored by Hausman disclaim the notion that cellular is a particularly risky business.[280] Even if we assume it is, *arguendo*, we previously have determined that CAPM estimates often are distorted by firms' use of unrealistic risk assumptions and, consequently, have declined to adopt such methods when estimating appropriate returns.[281] Nothing in this record causes us to reconsider that determination.

128. We accord some weight to arguments that the baseline accounting data overstate rates of return because those data may not adequately reflect interest payment obligations. Interest expenses for some companies are known to be substantial, and some portion of these expenses undoubtedly is attributable to acquisition of cellular licenses in the secondary market.[282] The level of activity in that market was fueled to some degree by the

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[277] Cellular Communications Licensees (Wholesalers) Annual Reports to the Public Utilities Commission, State of California. These reports are publicly available. We also developed an econometric model to estimate rate of return and gross plant for the remaining carriers in California. *See* Appendix B at Table 16.

[278] *See* Appendix B at Table 1.

[279] AirTouch Comments, Hausman Appendix at 17.

[280] AirTouch *ex parte*, Mar. 9, 1995, Hausman Attachment at 3 (assertions that demand for cellular service was clear and substantial prior to licensing of cellular spectrum during early 1980s). This expression of opinion by Hausman does not appear to be based on confidential data unavailable to other parties, and, in any event, we consider it only for the limited purpose indicated in the text.

[281] *See, e.g.*, Represcribing the Authorized Rate of Return for Interstate Service of Local Exchange Carriers, 5 FCC Rcd 7507, 7518 (1990).

[282] For example, by one report McCaw had approximately $9 billion in assets as of the end of 1993, of which $1.6 billion was plant and equipment, $4.0 billion was licensing cost and $2.0 billion was other investments (such as an approximately 52 percent interest in Lin Broadcasting). *See* Standard & Poor's Industry Survey: Telecommunications, Basic Analysis, June 2, 1994, T40. McCaw also reported had $5.1 billion in long term debt on its books that year. *See* Moody's OTC Industrial Manual (1994), 1887. McCaw has an interest in many licenses in California. *See* California Petition,

inefficiency of the lottery method we used to award cellular licenses initially. Since such acquisition costs were incurred after the initial grant of license, they normally would be excluded from the "rate base" used to calculate a carrier's earnings under traditional regulatory accounting methods, which are designed to prevent companies subject to rate of return regulation from artificially expanding their rate bases through sham transactions. Cellular carriers in California never have been subject to rate of return regulation, so the question of whether the aforementioned accounting methods should be applied to them arguably is legitimate. The task of resolving that question is beyond the scope of this proceeding, however, in part because the record does not contain sufficient data to permit anything but the crudest estimate of the impact of this issue on the returns under review here. For purposes of this proceeding, it is enough to note that the potential impact is significant.[283] The CPUC notes that this issue, if decided in favor of the carriers, has the potential to "erase[]" their reported profits.

129. Notwithstanding this debate, we think the component parts of the industry-wide return we have calculated is more illuminating than the number as a whole, for several reasons. First, although the CPUC contends that carriers' earnings are consistently high, the actual data per carrier present a different picture. Viewed by individual carrier, earnings differ substantially from year-to-year and from carrier-to-carrier. In 1993, for example, many of the carriers realized earnings at levels that raise no plausible concern.[284] Some were only marginally profitable for the period as a whole.[285] Earnings also differed appreciably between carriers in the same geographic area.[286] This evidence undercuts the CPUC's claim that earnings are largely a function of market power created by a duopoly licensing structure. Other factors are at work here. In particular, differences between carriers in the same area suggest that some carriers are more efficient than others, and this is not a cause for regulatory concern.

Appendix C, C-1. The financial reports those licensees submit to the CPUC do not appear to show interest expense burdens of the magnitude attributed to McCaw elsewhere. For example, L.A. Cellular reports to the CPUC show no debt. McCaw Communications of Stockton, Inc., had about $800,000 interest expenses against about $13 million in operating profits. *See* Cellular Communications Licensees (Wholesalers) Annual Report to the Public Utilities Commission, State of California.

[283] *See* CPUC Petition at 56.

[284] *See id.* (Fresno MSA LP, 10.7 percent; GTE MobileNet of Santa Barbara, 7.5 percent; Modoc RSA LP, -6.2 percent; Redding Cellular, 3.1 percent; Sacramento Valley LP, 6.4 percent; Salinas Cellular, 7.2 percent; Santa Barbara Cellular, 10.5 percent; Santa Cruz, 14 percent; US West Cellular, 2.9 percent).

[285] *See id.* (US West: 9 percent (1990), -4.3 percent (1991), -7.4 percent (1992), 2.9 percent (1993)).

[286] *Compare, e.g.,* Bay Area (49.5 percent) *with* GTE (18.1 percent) (1993).

(2) Capacity Utilization Rates

130. The CPUC's argument that market conditions are unreasonable places great weight on capacity utilization data. Extensive data of this kind are included in Appendix M to the CPUC Petition. These data show actual usage of each cell measured against a theoretical "peak load" level (*i.e.*, a level considered to constitute the point above which usage would produce an unacceptable percentage of blocked calls). The data show an uneven cell usage. We conclude that the CPUC's reliance on such data is misguided. As several carriers point out, no reasonable carrier would engineer its network to operate all or even most of cells at peak load capacity. Investment in cell sites tends to be "lumpy."[287] In addition, carriers may legitimately construct additional capacity to improve quality beyond the peak load standard. This evidence does not support the weight the CPUC has asked it to carry.

(3) Growth

131. In assessing profit levels, the CPUC Petition does not address the relationship between reported earnings and industry growth. This oversight is significant. We believe the long term effect of growth on pricing and investment decisions is substantial, and is at least as important a consideration in evaluating cellular industry returns as the short term effect of such decisions on consumer surplus.[288] Cellular is one of the fastest growing industries in this country, with carriers typically experiencing intramarket annual subscriber growth rates of 30 to 50 percent. Gross investment by California cellular carriers increased by 270 to 475 percent between 1989 and 1993 according to the data provided by the CPUC.[289] This represents growth on a substantially different scale than one typically finds in other capital-intensive segments of the telecommunications industry, and it must be factored into any reasonable analysis of industry performance.[290]

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[287] CCAC Comments, Appendix A at 28.

[288] The effect of market structure on investment and technological innovation is a major topic in industry organization economics. *See* Scherer and Ross, 613-60. Many economists have long believed that market power can in the long run lead to favorable results for consumers. *See, e.g.*, J. Schumpeter, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942); L. Switzer "The Determinants of Industrial R & D," 66 *Review of Economic and Statistics*, 163-68 (Feb. 1984).

[289] *See* Appendix B at Table 10.

[290] Mature and emerging industries have different characteristics, and these differences are relevant to any analysis of industry performance. For example, some studies show that market share is significant determinant of rate of return on investment in mature industries but not in emerging industries. *See, e.g.*, J. Prescott, A. Kohli & N. Ven Katraman, "The Marketshare-Profitability Relationship: An Empirical Assessment of Major Assertions and Contradictions," *Strategic Management Journal*, Spring 1986, at 386.

132. A key element of the study of markets is the recognition that not all industries and markets are at the same stage of development.[291] Thus, the comparison necessary for determining whether rates of return are "too high" is not with mature industries, but with high growth industries. It has been shown that the rate of growth of output is one of the most important determinate of profitability; that is, all other things being equal, high growth firms (such as the cellular industry) tend to earn high profits.[292] Thus, a showing that reported cellular industry profits are higher than realized by other telecommunications service providers, such as local exchange carriers, is not automatically disturbing.

133. To illustrate this, we consider the interrelationship of growth of demand and plant investment. Demand growth can be modelled as a process of diffusion; that is, a learning process by consumers.[293] Diffusion simply means that potential consumers "learn" how much consumer surplus (value above the amount they pay) they will receive from cellular service by observing actual consumers. This process is intertwined with carriers' investment decisions. Specifically, while a cellular carrier's failure to invest in additional capacity does not automatically discourage additional subscribership in the near term, ultimately it will have that effect because adding new customers without expanding system capacity will reduce service quality and, thus, consumer surplus. Potential subscribers will receive that signal and not sign up for service; existing subscribers may cancel service. Subscribership will not grow or, potentially, will decline. This negative subscribership pattern obviously does not characterize the cellular industry, which typically has experienced 30 to 50 percent subscriber growth in an environment historically marketed by somewhat static pricing and not particularly elastic demand.[294]

134. From a consumer perspective, the interrelationship of diffusion and carriers' investment decisions is directly relevant to the issue of whether reported industry profits are "too high." Imagine a situation in which cellular prices, and hence profits, were reduced. Lower prices would induce some additional consumers to take service, but lower

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[291] For example, Prescott, Kohli, and Ven Katraman have shown that the determinants of rate of return on investment vary between mature industries and emerging industries. *See* J. Prescott, A. Kohli & N. Ven Katraman, "The Marketshare-Profitability Relationship: An Empirical Assessment of Major Assertions and Contradictions," Strategic Management Journal, Spring 1986, 377-94. They found, for example, that high market share is correlated with high rates of return in mature industries, but not for emerging industries. *Id.* at 386.

[292] D. Ravenscraft "Structure-Profit Relationship at the Line of Business and Industry Level," *Review of Economic and Statistics*, Feb. 1983, at 22-31.

[293] *See, e.g.*, N. Vettas, "Demand and Supply in New Markets: Diffusion with Bilateral Learning," presented at Allied Social Science Associations Meeting, Jan. 8, 1995.

[294] *See* Appendix B at Table 16. Some cellular growth must be attributed to reductions in the cost of end user equipment.

profits arguably would discourage carriers from expanding system capacity. Service quality degradation then would reduce available consumer surplus.[295] Thus, consumers are not necessarily better off under a scenario in which carriers earn are precluded from earning some economic rents.[296]

135. It is not possible to determine what rate of return would be associated with optimal consumer surplus, but that is not our task in this proceeding. The relevant point for present purposes is that in that optimal consumer surplus in the context of a rapidly growing industry occurs at some *positive* level of economic rents, such as are reflected on this record, and that such rents do not necessarily show that market conditions fail to protect consumers adequately from unreasonable rates, as the CPUC contends.

(4) Investment

136. The CPUC observes that cellular profits are not improper "to the extent that cellular carriers used the profits to expand capacity and increase service availability to the public."[297] As a general proposition, we do not agree with the assertion that high profits are reasonable *per se* if they are reinvested in capacity expansion because it is easy to imagine instances in which such investment would be inefficient and contrary to the public interest. In the CMRS setting, however, Congress has expressed some degree of interest in facilitating investment in wireless infrastructure. Thus, in this setting, we consider evidence of sustained cellular investment material to the statutory standard for evaluating petitions filed pursuant to Section 332(c)(3)(B).

137. Although the CPUC presents this test of reasonableness in its Petition, it failed to examine whether cellular carriers, in fact, applied their earnings in the identified manner. This oversight is significant. For the period for which data are available, record evidence shows increases in gross investment per carrier on the order of between 180 and

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[295] Consider, for example, that our statistical model (Appendix B at Table 15, Regression 2) predicts that a 10 percent price reduction would only increase demand in the current period by about 4 percent, and growing 7 percent after two years, and to about 12 percent after five years. On the other hand, if reduced quality of service reduces consumer surplus enough to reduce the diffusion effect by 4 percent then the increase in customers would from the second year on would only be 4 percent. Reducing consumer surplus through reduced investment enough to reduce the diffusion effect by 10 percent would result in a *net* loss of customers of about 3.5 percent per year (16 percent over 5 years). Finally, of course, there is the direct loss of consumer surplus by actual consumers.

[296] All of this analysis is consistent with the phenomenon that other things being equal, the effect of cash flow on investment tends to be larger for firms in growing sectors. In addition, cash flow effects investment more for young firms (under 12 years old) than for mature firms. *See* M. Devereux & F. Schiantarelli, "Investment, Financial Factors, and Cash Flow," in ASYMMETRIC INFORMATION, CORPORATE FINANCE, AND INVESTMENT 279-306 (1990)(R. Hubbard, ed.).

[297] CPUC Petition at 50.

475 percent.[298] In fact, most carriers experienced a point when their accounting rate of return might be viewed as high yet, as a financial investment, their operations yielded no return because most or all of that return was reinvested to support expansion.[299] Even in the largest markets, in certain years increases in net plant were substantially above after-tax operating profits. In 1990, over 80 percent of the net income earned in the top three markets was reinvested to increase net plant. Over the four-year period studied, LA SMSA, Bay Area and Pactel reinvested approximately 35 percent, 32 percent, and 47 percent of their profits. Many carriers in middle sized markets continue to reinvest beyond their profits. In 1993, Sacramento Valley, Fresno Cellular, Fresno MSA and GTE of Santa Barbara each increased net plant *by more than double* their net operating profits. By contrast, available evidence indicates that net plant of cable television fell over this same timeframe.[300] The net plant of companies in more mature segments of the market for telecommunications services increased, but apparently by less than one percent per year.[301]

138. This evidence strongly suggests that the California cellular industry is, in fact, using its profits "to expand capacity and increase service availability to the public," thereby meeting the CPUC's own test for evaluating whether profit levels are reasonable. We note that such investment has had beneficial effects. Without it, the quality of service would have declined as additional subscribers were added. We also stress that the money earned by serving cellular customers was applied to expand service to additional *cellular* customers. Thus, the class of customers who paid for the increased plant and equipment is the very same class of customers who benefited from the carriers' pricing and investment decisions. We view this fact to be decisionally significant.

139. Apart from that, we note that such investment has important long-term competitive implications. Specifically, investment made in the 1990's will be in place when cellular carriers face significant competition from broadband PCS providers. In theory, cellular carriers might have chosen the alternative strategy of "cashing-out" in the face of this competition. That is, cellular carriers might have decided that because they cannot sustain high returns on marginal investments made during the 1990's, they would stop increasing net plant, possibly even let it shrink, so as to expand their rate of return prior to

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[298] *See* Appendix B at Table 8.

[299] *See, e.g.*, Appendix B at Table 9 (drawn from Standard and Poor's, *Industry Surveys: Telecommunications, Basic Analysis*, June 2, 1994).

[300] *See id.* at Table 12.

[301] *See id.* at Table 13. We express no opinion here on the adequacy of this investment or that of the cable television industry cited *supra*. The contrast is shown solely to illuminate the fact of pronounced reinvestment of profits by cellular telephone companies in California. Aggregate investment by the cited industries is substantial by any measure.

facing more intense competition. The data in this record do not demonstrate that carriers are pursuing this alternative strategy. This, too, is decisionally significant.

140. The record also provides no persuasive evidence that investment by cellular carriers represents an undertaking designed to deter entry.[302] That is, in some circumstances incumbent firms may aggressively invest in plant and equipment to send a message to potential entrants that "your entry would prove unprofitable, because my large capacity will allow me to compete vigorously." All available evidence indicates that PCS entry is a certainty, which means incumbent firms have no apparent incentive to employ a predatory investment strategy. The far more reasonable interpretation of cellular carriers' investment pattern is that they plan to be vigorous competitors for the foreseeable future. This, too, is decisionally significant.

141. Against this background, we conclude that carriers' actual profitability arguably is lower than reported, and appears to satisfy the CPUC's own standard of reasonableness because it has been devoted to a substantial extent to system expansion needed to serve consumer demand for cellular service. This evidence does not, as the CPUC claims, unambiguously demonstrate that market conditions fail to protect consumers adequately from unjust and unreasonable rates, or unjustly and unreasonably discriminatory rates.

VI. REGULATION OF OTHER TERMS AND CONDITIONS

142. Prior to OBRA, Section 332 prohibited the states from imposing "rate ... regulation" upon certain wireless telecommunications carriers.[303] This prohibition was construed broadly to preclude almost all state regulatory activity.[304] As revised by OBRA,

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[302] *See, e.g.*, J. Ordover & R. Willig, "An Economic Definition of Predation: Pricing and Product Innovation," 91 YALE L.J. 8 (1981).

[303] The statute provided in relevant part that "[n]o state or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . . ." 47 U.S.C. § 332(c)(3)(prior to revisions enacted by OBRA).

[304] *See, e.g.*, Telocator Network of America v. FCC (Millicom), 761 F.2d 763 (D.C. Cir. 1985) (upholding Commission's interpretation of Section 332(c)(1), 47 U.S.C. § 332(c)(1), in determining whether preemption provisions of that section apply to a given communications system). *See also, e.g.*, American Teltronix (Station WNHM552), 3 FCC Rcd 5347 (1988)("Congress did not intend that a private land mobile licensee who, either intentionally or inadvertently, provides service to ineligible users would thereby subject itself to state regulatory authority, including possible sanctions, for operating as a common carrier."), *recon. denied*, 5 FCC Rcd 1955, 1956 (1990)(note omitted) ("state entry and rate regulation of a communications service offered by a private land mobile radio system is preempted by statute .... [A]ccompanying legislative history reveals that Congress recognized the Commission's broad discretion to dictate which land mobile systems are to be regulated as private."). The Commission again stated its view of preemptive authority under that provision when it adopted a Notice of Inquiry respecting Personal Communications Services.

Section 332(c)(3) now prohibits states from regulating "the rates charged" for CMRS, but it expressly reserves to them the authority to regulate the "other terms and conditions of commercial mobile services." Although there is no definition of the term "the rates charged" in the statute or its legislative history, there is legislative history regarding the "other terms and conditions" language. We believe it is sufficient to allow us to comment in a preliminary manner on what regulatory activities the CPUC is entitled to continue, despite our denial of its Petition.

143. The House of Representatives Committee on Energy and Commerce, reporting on the House bill that was incorporated into the amended Section 332, noted that even where state rate regulation is preempted, states nonetheless may regulate other terms and conditions of commercial mobile radio services. The Committee stated:[305]

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.*, zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

144. Establishing with particularity a demarcation between preempted rate regulation and retained state authority over terms and conditions requires a more fully developed record than is presented by the California Petition and related comments. Thus, we will not expound at any length on this matter. The legislative history largely speaks for itself. It is possible to extrapolate certain findings from the legislative history, however, and we do so here in the interest of minimizing future proceedings directed at this issue.

145. First, although the CPUC may not prescribe, set, or fix rates in the future because it has lost authority to regulate "the rates charged" for CMRS, it does not follow that its complaint authority under state law is entirely circumscribed. Complaint

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Amendment of the Commission's Rules To Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3995, 3998 n.19 (1990):

> If these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations. If we classify these services as private land mobile, such state regulation would be expressly preempted under Section 332(c)(3).

[305] H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 261.

proceedings may concern carrier practices, separate and apart from their rates.[306] In consequence, it is conceivable that matters might arise under complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit the CPUC to continue to conduct proceedings on complaints concerning such matters, to the extent that state law provides for such proceedings.

146. Second, under the same logic, we also conclude that several other aspects of California's existing regulatory system may fall outside the statutory prohibition on rate regulation. For example, a requirement that licensees identify themselves to the CPUC, or whatever other agency the state decides to designate, does not strike us as rate regulation, so long as nothing more than standard informational filings is involved. Moreover, nothing in OBRA indicates that Congress intended to circumscribe a state's traditional authority to monitor commercial activities within its borders. Put another way, we believe the CPUC retains whatever authority it possesses under state law to monitor the structure, conduct, and performance of CMRS providers in that state.[307] We expect that, to the extent any interested party seeks reconsideration on this issue, it will specify with particularity the provisions of California's existing rate regulation practice at issue.

147. Finally, we do not consider it necessary at this time to address the contention that we have jurisdiction over intrastate rates for CMRS, following termination of the CPUC's rate regulation authority, which we can employ to protect resellers.[308] The question whether we have jurisdiction over CMRS intrastate rates has been raised in petitions for reconsideration of the *CMRS Second Report and Order* and will be addressed some time in the future in the context of that proceeding. If we are persuaded upon reconsideration of the instant proceeding that it is necessary to address that issue here, we will do so, but only upon a showing by petitioners that resolution of the issue is necessary to resolve a material issue raised in this record. That showing must consist of evidence and argument establishing

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[306] *E.g.*, Section 208(a) of the Communications Act authorizes complaints by any person "complaining of *anything done or omitted to be done* by any common carrier subject to this Act, in contravention of the provisions thereof." 47 U.S.C. § 208(a) (emphasis added).

[307] We remind the CPUC that the certification process is precluded by the provision in amended Section 332 that categorically preempts state and local entry regulation and that the statute makes no provision for continuance or extension of this authority by this Commission. As of the effective date of the amendment, therefore, California's certification jurisdiction over commercial mobile radio service was terminated. *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. at 261.

[308] *See* Comments of McCaw at 6-7; Supplemental Reply at 5-6. McCaw contends that, absent a successful state petition, Federal regulatory principles of nondiscrimination and just and reasonable rates "are enforceable solely by *federal* regulators" and "are not terms and conditions to be implemented by the states." *Id.* at 7 n.21 (emphasis in original).

such a nexus and supporting the substantive position argued, *i.e.*, that we have or have not inherited intrastate rate regulation over CMRS.

VII. ORDERING CLAUSES

148. Accordingly, pursuant to Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), IT IS ORDERED that the Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates IS DENIED for the reasons set forth above.

149. IT IS FURTHER ORDERED, that California's motion to strike, filed March 16, 1995, and directed to the supporting affidavit of Jerry Hausman (submitted March 8 by AirTouch as part of a written *ex parte* communication), IS GRANTED to the extent indicated herein.

150. IT IS FURTHER ORDERED, pursuant to Sections 1.4(b), 1.4(b)(2), and 1.106(f) of the Commission's Rules, that any petition for reconsideration of this order SHALL BE FILED within thirty days of the day after the day on which public notice of this action is given.[309]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[309] Although we assigned the CPUC Petition a docket number for administrative convenience, this is an adjudicatory-type proceeding, not a rulemaking.

APPENDIX A

List of Parties Filing Comments

Party (and Short Title)

AirTouch Communications (AirTouch)

American Mobile Telecommunications Association, Inc. (AMTA)

Bakersfield Cellular Telephone Co. (Bakersfield)

Bay Area Cellular Telephone Co. (BACTC)

Cellular Agents Trade Association (CATA)

Cellular Carriers Association of California (CCAC)

Cellular Resellers Association, Inc., Cellular Service, Inc., and Comtech Mobile Telephone Company (Cellular Resellers)

Cellular Telecommunications Industry Association (CTIA)

County of Los Angeles (L.A. County)

E.F. Johnson Company (E.F. Johnson)

GTE Service Corporation, On Behalf of its Telephone and Personal Communications Companies (GTE)

Los Angeles Cellular Telephone Company (L.A. Cellular)

McCaw Cellular Communications, Inc. (McCaw)

Mobile Telecommunication Technologies Corporation (Mtel)

National Cellular Resellers Association (NCRA)

Nextel Communications, Inc. (Nextel)

Paging Network, Inc. (Pagenet)

Personal Communications Industry Association (PCIA)

Utility Consumers' Action Network and Towards Utility Rate Normalization (UCANTURN)

US West Cellular of California, Inc. (US West)

List of Parties Filing Reply Comments

AirTouch Communications (AirTouch)

Cellular Carriers Association of California (CCAC)

Cellular Resellers Association, Cellular Service, Inc., and ComTech Mobile Telephone Company (Cellular Resellers)

Cellular Telecommunications Industry Association (CTIA)

County of Los Angeles (L.A. County)

GTE Service Corporation, On Behalf of its Telephone and Personal Communications Companies (GTE)

Los Angeles Cellular Telephone Company (L.A. Cellular)

McCaw Cellular Communications, Inc. (McCaw)

Mobile Telecommunication Technologies Corporation (Mtel)

Nextel Communications, Inc. (Nextel)

PageMart, Inc. (PageMart)

People of the State of California and the Public Utilities Commission of the State of California (CPUC)

Rural Cellular Association (RCA)

US West Cellular of California, Inc. (US West)

List of Parties Filing Supplemental Comments

AirTouch Communications (AirTouch)

Cellular Carriers Association of California (CCAC)

Cellular Resellers Association, Inc., Cellular Service, Inc., and ComTech Mobile Telephone Company (Cellular Resellers)

GTE Service Corporation, On Behalf of its Telephone and Personal Communications Companies (GTE)

Los Angeles Cellular Telephone Company (L.A. Cellular)

McCaw Cellular Communications, Inc. (McCaw)

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Los Angeles Cellular Telephone Company (L.A. Cellular)

McCaw Cellular Communications, Inc. (McCaw)

APPENDIX B
TABLE 1
After Tax Rates of Return on Net Plant and Equipment

Company	Starting Date	Pops	1989	1990	1991	1992	1993
Bakersfield Cellular	3/88	543477					61.5
Bay Area Cellular	9/86	5184169	43.7	48.1	43.5	31.1	49.5
Cagal Cellular	1/89	388222		1.2	17.6	17.0	35.8
California 2 Cellular	8/91	57015			-49.0	-55.0	
Contel Cellular of CA (RSA # 7)	10/90	109303		-32.2	-19.5	6.0	35.4
Fresno Cellular	10/87	979411	-19.6	11.9	24.0	31.3	25.7
Fresno MSA LP	4/86	1624357		8.0	7.6	11.2	10.7
GTE Mobilnet of California	3/85	6826133	22.8	15.8	16.4	20.0	18.1
GTE Mobilnet of Santa Barbara	11/87	369608	2.6	2.0	8.5	6.7	7.5
Los Angeles Cellular	12/86	13862513	71.4	58.5	52.4	51.6	47.0
LA SMSA LP	6/84	14531529	49.4	43.3	34.8	28.0	33.8
McCaw Communications of Stockton	12/87	857150		31.4	27.0	26.0	32.2
Modoc RSA LP	10/90	57015		-15.0	-24.4	-19.2	-6.2
Napa Cellular	4/88	451186		7.4	19.5	32.7	32.5
PacTel Cellular	8/85	2498016	33.0	32.9	23.9	21.4	30.4
Redding Cellular	3/89	237734					3.1
Sacramento Cellular	10/87	1477750	-2.9	21.4	22.1	22.2	17.4
Sacramento Valley LP	7/85	2836582	17.6	10.1	2.8	0.8	6.4
Salinas Cellular	3/89	355660		-21.6	-8.3	5.2	7.2
Santa Barbara Cellular	12/87	369608	-39.4	-10.4	-9.7	5.0	10.5
Santa Cruz	1/89	229734			-2.7	9.5	14.0
US West Cellular	4/86	2498016	5.2	9.0	-4.3	-7.4	2.9
Ventura Cellular	7/87	669016		39.3	27.1	21.5	24.5
Weighted Sum			34.4	33.2	28.7	26.7	30.2

Weighted sum is by gross investment and includes estimates for missing markets. *See* Appendix 71.
Source: Cellular Communications Licensees (Wholesalers) Annual Reports to the Public Utilities Commission, State of California for the Years 1989, 1990, 1993; California Petition at Appendices G and H.

Table 2*

14 Carrier Monthly Price Indices

Year	1990	1991	1992	1993
Best Price				
60	$63.03	$63.03	$62.95	$58.48
120	$85.09	$84.95	$84.87	$76.93
480	$219.42	$218.05	$216.76	$191.06

Table 3*
11 Carrier Monthly Price Indices

Year	1989	1990	1991	1992	1993
Best Price					
60	$64.72	$63.12	$63.12	$63.10	$58.60
120	$87.89	$85.19	$85.06	$85.04	$77.05
480	$226.64	$219.67	$218.29	$217.17	$191.31

Table 4*
14 Carrier Annual Operating Expense Indices

Year	1990	1991	1992	1993
Annual Per Subscriber Operating Expense	$701.53	$699.51	$662.11	$589.63

Table 5*
11 Carrier Annual Operating Expense Indices

Year	1989	1990	1991	1992	1993
Annual Per Subscriber Operating Expense	$685.43	$669.79	$680.01	$654.76	$586.10

*Source: California Petition at Appendices H and J. Averages are weighted by number of subscribers in 1991. Prices assume 80% of minutes are peak-use minutes.

Table 6
Los Angeles Prices

	Single User			Best Volume Discount Price		
	60 minutes	120 minutes	480 minutes	60 minutes	120 minutes	480 minutes
12/31/93	69.84	85.08	201.60	56.86	75.96	198.72
12/31/94	56.39	85.08	201.60	56.86	75.96	198.72
2/28/95	56.39	84.03	200.72	49.49	69.98	185.90

The technique used to develop this table is similar to that those used by the State of California and the carriers. These are best available prices for a new user on the given day. The best price is not necessarily the same for both carriers. The price shown is the best available from some carrier for a new customer. This table shows that prices have fallen since the data proved by California. For example, the best price for 60 minutes fell 19% between 12/31/93 and 12/31/94. This was due to a new rate plan, plus a temporary promotional plan available for the first few months the new plan was made available. Only one of the carriers had that promotion in effect on 2/28/95.

Sources: CPUC Petition at Appendix J; AirTouch *ex parte* (3/17/95); BellSouth *ex parte* (3/23/95).

Table 7
Hazlett's Estimates of q ratios for Cellular Telephone Markets

Market Size	Replacement Cost of All Tangible Assets (per pop)	Average Sales Prices (per pop)	q ratios
Small	$19.67	$131.46	6.68
Medium	13.59	168.62	12.41
Large	18.57	250.98	13.52

Source: Thomas W. Hazlett, "Market Power in the Cellular Telephone Duopoly," Report prepared for Time Warner Telecommunications, (1993) at 14.

Table 8
Gross Plant and Equipment

Company	1989 Average Gross Plant	1993 Average Gross Plant	% Change
Bay Area Cellular Telephone Company	$60,944,400	$167,085,340	274.16 %
Contel Cellular (RSA # 7)	$843,876*	$2,033,262	240.94 %**
Fresno Cellular Telephone	$7,611,804	$36,202,848	475.61 %
Fresno MSA LP	$29,210,172*	$59,878,844	204.99 %**
GTE Mobilnet of California	$71,249,619	$223,211,160	313.28 %
GTE Mobilnet of Santa Barbara	$4,987,380	$23,510,773	471.41 %
Los Angeles Cellular Telephone Company	$103,256,492	$356,808,969	345.56 %
Los Angeles SMSA LP	$155,537,562	$436,892,736	280.89 %
Modoc RSA LP	$222,496*	$406,134	182.54 %**
PacTel Cellular Corp.	$25,171,848	$74,410,848	295.61 %
Sacramento Cellular Telephone	$17,783,992	$75,240,207	423.08 %
Sacramento Valley LP	$24,503,636	$86,134,277	351.52 %
Santa Barbara Cellular	$4,558,632	$15,010,065	329.27 %
US West Cellular	$20,500,963	$62,091,140	302.87 %

*1990 Average Plant and Equipment.

**Percentage change between 1990 and 1993.

Source: Cellular Communications Licensees (Wholesalers) Annual Reports to the Public Utilities Commission, State of California, for the Years 1989, 1990, 1993.

Table 9
After Tax and Interest Rates of Return

	Return on Revenues (%)					Return on Assets (%)					Return on Equity (%)				
Wireless Service Company	1989	1990	1991	1992	1993	1989	1990	1991	1992	1993	1989	1990	1991	1992	1993
AirTouch Communications Inc.	NA	NA	NA	NM	3.8	NA	NA	NA	NM	1.2	NA	NA	NA	NM	3.8
Lin Broadcasting	22.9	NM	NM	NM	NM	9.1	NM	NM	NM	NM	12.5	NM	NM	NM	NM
McCaw Cellular Communications	NM	35.8	NM	NM	NM	NM	6.3	NM	NM	NM	NM	23.0	NM	NM	NM
Mobile Telecommunications Tech	NM	NM	NM	NM	12.9	NM	NM	NM	NM	5.8	NM	NM	NM	NM	9.0
Nextel Communications	NA	NM	NM	NM	NA	NA	NM	NM	NM	NA	NA	NM	NM	NM	NA
US Cellular Corp	NM	NM	NM	3.8	NM	NM	NM	NM	0.8	NM	NM	NM	NM	1.5	NM
Vanguard Cellular Sys.	NM	NM	NM	NM	NM	NM	NM	NM	NM	NM	NM	NM	NM	NM	NM

Source: Standard and Poor's, *Industry Surveys:Telecommunications, Basic Analysis*, June 2, 1994.

Table 10
Growth of Net Plant and Reinvestment of Profits
Large Markets

	1990		1991		1992		1993		Totals
LA Cellular	$96,688,679	58.5%	$114,743,744	52.4%	$123,679,819	51.6%	$117,062,349	47.0%	
	$79,035,183	62.8%	$28,050,707	13.7%	$13,314,843	5.7%	$5,953,922	2.4%	100.4%
	$17,653,496	81.7%	$86,693,037	24.4%	$110,364,976	10.8%	$111,108,427	5.1%	27.9%
LA SMSA	$78,333,706	43.3%	$75,885,956	34.8%	$67,588,920	28.0%	$107,060,669	33.8%	
	$47,999,081	30.7%	$26,880,596	13.1%	$19,490,570	8.4%	$20,301,980	8.1%	73.2%
	$30,334,625	61.3%	$49,005,360	35.4%	$48,098,350	28.8%	$86,758,689	19.0%	34.9%
Bay Area	$30,154,000	48.1%	$34,169,000	43.5%	$43,421,000	31.1%	$46,965,000	49.5%	
	$20,939,820	40.2%	$10,665,985	14.6%	$12,803,201	15.2%	$4,490,405	4.6%	93.8%
	$9,214,180	69.4%	$23,503,015	31.2%	$30,617,799	29.5%	$42,474,595	9.6%	31.6%
GTE	$14,093,498	15.8%	$19,561,031	16.4%	$27,987,242	20.0%	$56,820,926	18.1%	
	$38,022,816	108.4%	$15,119,123	26.1%	$24,054,868	49.1%	$2,773,285	32.8%	160.5%
	($23,929,318)	269.8%	$4,441,908	77.3%	$3,932,374	85.9%	$19,676,415	65.4%	96.5%
Pactel	$9,420,334	32.9%	$8,695,668	23.9%	$9,029,050	21.4%	$13,763,336	30.4%	
	$4,967,020	19.0%	$10,638,868	34.2%	$798,841	1.9%	$2,773,285	6.5%	73.4%
	$4,453,314	52.7%	($1,943,200)	122.3%	$8,230,209	8.8%	$10,990,051	20.1%	46.9%
US West	$2,061,320	9.0%	($2,289,155)	-4.3%	($3,306,232)	-7.4%	$1,105,499	2.9%	
	$11,169,558	72.4%	$7,654,099	23.5%	($4,086,613)	-10.2%	$4,749,174	16.5%	91.2%
	($9,108,238)	541.9%	($9,943,254)	na	$780,381	na	($3,643,675)	429.6%	na
% of Profit		87.6%		39.5%		24.7%		13.4%	

See Table 11 for source and key.

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Table 11
Growth of Net Plant and Reinvestment of Profits
Middle Markets

	1990		1991		1992		1993		Totals	
Sacramento	$5,807,217	21.4%	$9,319,977	22.1%	$11,584,920	22.2%	$13,084,721	17.4%		
Cellular	$12,470,559	59.5%	$11,740,368	35.1%	$2,601,171	5.1%	$8,130,246	15.2%	166.8%	
	($6,663,342)	214.7%	($2,420,391)	126.0%	$8,983,749	22.5%	$4,954,475	62.1%	87.8%	
Sacramento	$3,146,079	10.1%	$1,161,634	2.8%	$408,726	0.8%	$3,816,168	6.4%		
Valley	$11,925,787	47.4%	$9,107,329	24.6%	$9,233,474	20.0%	$7,855,037	14.2%	151.5%	
	($8,779,708)	379.1%	($7,945,695)	784.0%	($8,824,748)	2259%	($4,038,869)	205.8%	446.8%	
Fresno	$1,206,532	11.9%	$3,691,182	24.0%	$7,020,723	31.3%	$7,386,001	25.7%		
Cellular	$3,499,594	41.9%	$7,041,408	59.4%	$7,083,749	37.5%	$5,478,937	21.1%	276.4%	
	($2,293,062)	290.1%	($3,350,226)	190.8%	($63,026)	100.9%	$1,907,064	454.1%	119.7%	
Fresno MSA	$3,102,821	8.0%	$3,259,573	7.6%	$6,078,225	11.2%	$7,810,658	10.7%		
	$3,165,709	14.2%	$4,200,037	17.3%	$13,360,763	49.2%	$14,496,542	38.1%	157.8%	
	($62,888)	102.0%	($940,464)	128.9%	($7,282,538)	219.8%	($6,685,884)	467.2%	173.9%	(3 Yrs)
Santa	($465,319)	-10.4%	($632,347)	-9.7%	$406,513	5.0%	$1,150,016	10.5%		
Barbara	$2,375,008	72.0%	$1,750,983	30.9%	$1,473,543	19.9%	$4,073,408	45.8%	293.4%	
	($2,840,327)	na	($2,383,330)	-277%	($1,067,030)	362.5%	($2,923,464)	354.2%	2108%	
GTE of	$110,579	2.0%	$781,663	8.5%	$681,700	6.7%	$1,495,884	7.5%		
Santa Barb.	$756,332	14.7%	$6,514,901	110.5%	$5,960,377	82.7%	$6,448,918	48.9%	382.7%	
	($645,753)	684.0%	($5,733,238)	833.5%	($5,278,677)	874.3%	($4,953,034)	431.1%	641.1%	
% of Profit		264.9%		229.5%		151.7%		133.8%		

Key

After-Tax Income	Rate of Return
Increase in Net Plant	% Increase in Net Plant
Net Cash Flow	% of Profits Reinvested

Table 12
Investment By Cable TV Providers

Operator	1989		1993	
	Net Plant (Millions)	Households Passed (Thousands)	Net Plant (Millions)	Households Passed (Thousands)
Adelphia	320.4	1365.7	398.9	1758
Cablevision Systems	521.0	2429.6	643.5	3563
Century Communications	352.5	1500	431.9	1653
Comcast	612.9	2638.6	1021.0	4219
C-TEC	266.2	287.7	343.8	417
E.W. Scripps	552.4	961	712.7	1159
Falcon Cable	63.4	1048	66.8	1287
Galaxy Cable M.L.P	34.3	116.9	18.9	76
Jones Spacelink	159.1	2146.6	194.9	2163
Media General	421.7	282.2	515.2	324
Multimedia	175.4	598.8	240.8	694
TCA Cable	121.1	677.5	106.4	645
Tele-Communications	4179	9461.2	4935	17425
Times Mirror	1543.6	1846.7	1756.3	2069
Time Warner	2944	3317	3866	12012
Viacom	380.3	1653.3	554.2	1730
Totals	12647.3	30330.8	15806.3	51194
Net Plant per Household passed	$417		$309	

Source: Paul Kagan Associates, Inc., "The Cable TV Financial Databook," June 1990, June 1994.

Table 13
Telephone Company Investment

	1989 Gross Plant (Thousands)	1989 Net Plant (Thousands)	1993 Gross Plant (Thousands)	1993 Net Plant (Thousands)	% Increase in Gross Plant	% Increase in Net Plant
All Reporting LECs*	233,445,021	149,538,600	263,556,374	156,380,052	12.9%	4.6%
7 RBOC's	187,215,720	119,574,753	207,636,503	122,693,261	10.9%	2.6%
AT&T Communications, Inc.	26,116,103	16,135,201	25,231,150	16,130,858	-3.4%	-0.0%

Note: In total, all reporting carriers reinvested about 11% of net profits (before interest).

* LECs must report these data to the FCC if their gross revenues exceed $100 million. There were 53 reporting entities in 1989, 55 in 1993.
Source: Federal Communications Commission, Statistics of Communications Common Carriers, 1989/1990, 1993/1994.

TABLE 14
Reordering Hausman's Table

MSA No. In Hausman Table	MSA	Population	Monthly Price	Regulated
2	Los Angeles	13862513	99.99	Yes
1	New York	13698478	110.77	Yes
3	Chicago	7261176	58.82	
4	Philadelphia	4856881	80.98	
5	Detroit	4531636	66.76	
7	Boston	4029662	82.16	Yes
6	Dallas	3949075	59.78	
9	San Francisco	3686582	99.47	Yes
8	Washington	3660758	76.89	
10	Houston	3493644	80.33	

Using CMSA Pops

MSA No. In Hausman Table	Cluster	Population	Monthly Price	Regulated
2	Los Angeles	13862513	99.99	Yes
1	New York	13698478	110.77	Yes
3	Chicago	7865702	58.82	
4	Philadelphia	6107248	80.98	
8	Washington	6008977	76.89	
9	San Francisco	5184169	99.47	Yes
7	Boston	4739367	82.16	Yes
5	Detroit	4531636	66.76	
6	Dallas	4044096	59.78	
10	Houston	3711043	80.33	

Hausman notes that the average price in regulated MSAs is 39% higher than in unregulated MSAs. We note that average population in regulated clustered MSAs is 74% higher than in unregulated clustered MSAs. MSA to MSA, the difference is 91%.

TABLE 15

We used the confidential data provided by California, supplemented by information on growth by specific carriers during 1994, filed in *ex parte* presentations, to estimate demand relations. Two such regressions are included below.

Regression 1

Dependent Variable is Logit(Penetration)

	Coefficient	Std. Error	T-Statistic	Prob.
Constant	-14.33973	2.319734	-6.181625	0.0000
Log(Highinc)	1.425076	0.353007	4.036957	0.0001
Log(Age)	1.045669	0.118845	8.798619	0.0000
Log(Drive Time)	6.334967	1.190043	5.323310	0.0000
Log(Pops)	-0.864417	0.134228	-6.439905	0.0000
Log(P120/GCPI)	-1.261171	0.354760	-3.554996	0.0007
Observations:	76			
R-squared	0.723044			
Adjusted R-squared	0.703262			

Regression 2

Dependent Variable is Logit(Penetration)

	Coefficient	Std. Error	T-Statistic	Prob.
Constant	0.540140	0.680719	0.793485	0.4308
Log(Highinc)	0.101609	0.190845	0.532417	0.5965
Log(Age)	-0.250573	0.114829	-2.182142	0.0333
Log(P120/GCPI)	-0.327574	0.215884	-1.517358	0.1348
Log(Lagged Penetration)	0.806344	0.052959	15.22596	0.0000
Observations:	61			
R-squared	0.875118			
Adjusted R-squared	0.866197			

''Penetration'' is Subscribers/Population; ''Age'' is the number of months since construction of the system; ''Pops'' is the population based on the 1990 census; ''High Income'' is the percent of households with income greater than $50,000 in 1991; ''Drive Time'' is the average number of minutes to commute to work; ''P120'' is the best price for 120 minutes available from a carrier; ''GCPI'' is the general Consumer Price Index. Sources: 1992 Survey of Buying Power Demographic USA, 1990 US Census and Cellular Communications Licensees (Wholesalers) Annual Reports to the Public Utilities Commission, State of California.

Table 16

To obtain an estimate for the rate of return for the whole state, we used the following two regressions to estimate rate of return and gross plant:

Regression No. 1

Dependent Variable is Ln(GROSSPLANT)

	Coefficient	Std. Error	T-Statistic	Prob.
Constant	0.379602	1.642788	0.231072	0.8178
Ln(YEAR-1983)	1.553820	0.474709	3.273203	0.0015
Ln(POPS)	0.957653	0.059366	16.13130	0.0000
RSA	-0.819740	0.231829	-3.535974	0.0006
Ln(Age)	-0.359661	0.296603	-1.212601	0.2284
Ln(Age)2	0.089599	0.067273	1.331876	0.1862
Wireline	-0.142455	0.096554	-1.475390	0.1436

Observations:	98
R-squared	0.963382
Adjusted R-squared	0.960967

Regression No. 2

Dependent Variable is Ln(Rate Of Return+100)

	Coefficient	Std. Error	T-Statistic	Prob.
Constant	0.962987	0.613016	1.570900	0.1196
Ln(Pops)	0.162373	0.023126	7.021266	0.0000
Wireline	0.039833	0.028285	1.408258	0.1624
Min(0,Age-48)	-0.010266	0.001800	-5.703254	0.0000
Max(0,48-Age)	-0.000992	0.001927	-0.514704	0.6080
ln(High Income)	0.045439	0.052989	0.857512	0.3933
ln(Year - 1983)	0.821929	0.149831	5.485705	0.0000

Observations:	101
R-squared	0.639238
Adjusted R-squared	0.616210

''Age'' is the number of months since construction of the system; ''Pops'' is the population based on the 1990 census; ''High Income'' is the percent of households with income greater than $50,000 in 1991. Sources: 1992 Survey of Buying Power Demographic USA, 1990 US Census and Cellular Communications Licensees (Wholesalers) Annual Reports to the Public Utilities Commission, State of California.